

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

77-7018

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

B

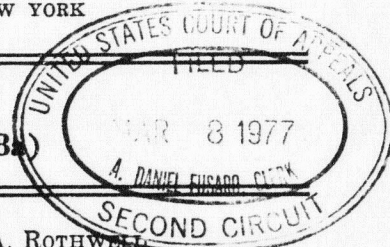
J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D., *Plaintiffs-Appellees,*
—against—

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,
Defendants,

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
(Volume I—Pages 1a-228a)



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Ronald C. Clement*

PAGINATION AS IN ORIGINAL COPY

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Case consolidated with this proceeding for all purposes.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

1a

73 CIV. 1727

Jury demand date:
by plttf. 4-18-73

Form No. 106 Rev.

JUDGE METZNER

TITLE OF CASE

ATTORNEYS

GORDON EDWARDS, Ph.D.
MAAS H. JUKES, Ph.D.,
BERT H. WHITE-STEVENS, Ph.D.,
Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
BERT S. ARBIB, JR.,
AND C. CLEMENT,
VIN J. STAHR, JR.,
Defendants.

For plaintiff:

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Washington, D.C. 20036

Local Counsel:
202 785-5020

Randolph J. Seifert

11 East 44th St., NYC 10017

MU-2-3663-5

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* and co-counsel: Gifford, Woody, Carter &
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14

For defendant:

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Gifford, Woody, Carter & Hays

1 Wall St., NYC 10005 (def. The National
Audubon Society)

Cahill, Gordon and Reindel

80 Pine St., NYC 10005 (def. NY Times Co., INC)

BEST COPY AVAILABLE

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed X	Clerk	APR 18 1973	Richwill C.	11	
6 mailed ✓	Marshal	4/19/73	4515		11
Cost of Action:	Docket fee				
FOR LITIGATION	Witness fees				
\$12,000.00					
on arose at:	Depositions				

JUDGE METZ

DATE	PROCEEDINGS	
April 13-73	Filed Complaint. Issued Summons.	
May 11, 73	Filed Summons with Marshal's Returns, Served: Elvis Stahr, Pres personally on 4/30/73. NY Times, any official, by C.R. Hylsart, Secy on 4/23/73	
May 15, 73	Filed Deft. The NY Times Co.'s Answer to Complaint.	CC&
May 23-73	Filed Notice of Deposition of plaintiffs.	BEU
May 23-73	Filed ANSWER of deft. National Audubon Society, Inc. to complaint.	
June 1-73	Filed Interrogs of pliffs to the N.Y. Times Co., Inc.	
June 1-73	Filed interrogs. of pliffs to National Audubon Society, Inc.	
June 12-73	Filed deft National Audubon Society, Inc. AMENDED ANSWER to the complaint.	
June 1-73	Filed interrogs. addressed to pliffs to be answered under oath.	
8-7-73	Filed deft. NY Times answer to pliffs. interrog.	
Nov. 29-73	Filed Deft. Notice of Motion, returnable 12/11/73 at 10:00 A.M. for an order relieving the attorney of record for Deft. National Audubon Society, Inc.	
Nov. 29-73	Filed for Pliffs. Notice of Deposition of John Devlin dtd 12/11/73 at 9:30 A.M.	
Dec. 4-73	Filed pliffs. notice of motion for an order compelling discovery and for the payment of reasonable expenses ret. on: Dec. 7, 1973.	
Dec. 5-73	Filed depts (Nat'l Audubon Society) answers to pliffs' interrog.	
Dec. 6-73	Filed affdvt. of Thomas A. Rothwell (for pliff) in opposition to motion by Richard Ingber Jones & Houston to withdraw as Attorneys.	
Dec. 10-73	Filed supplemental affdvt. of John L. Gaudin (for deft. Nat'l Audubon) in reply to affdvt. of Thomas A. Rothwell.	
Dec. 7-73	Filed supplemental affdvt. of Thomas A. Rothwell in support of plaintiff's motion to compel discovery.	
12-11-73	PRE-TRIAL CONFERENCE HELD BY Magistrate Silber	
Dec. 19-73	Filed affdvt. and pliffs notice of motion for an order sequestration of witnesses ret. Jan. 3-74 at 10 AM in Room 2201	
Dec. 19-73	Filed plaintiffs memorandum in support of motion for sequestration of witnesses.	
Jan. -3-74	Filed by deft. Nat'l Audubon Society, memorandum of law in opposition to motion to preclude one party from attending at the deposition of another.	
Jan. 3-74	Filed affdvt. of Charles L. Towbridge (for deft. Nat'l Audubon) in opposition to motion to preclude one party from attending deposition of another.	
Jan. 11-74	Filed defendants (Nat'l Audubon S.) notice to take deposition of John Devlin on 1-16-74	
Jan. 10-74	Filed defendants (Nat'l Audubon S.) interrogs. to the N.Y. Times Co., Inc.	
Jan. 23-74	Filed consent order substituting Attorneys for deft. National Audubon Society.	CMACA
Jan. 23-74	Filed memo endorsed on motion to substitute Atty. for Metzner, J. m/n	
Apr. 24-74	Filed OPINION #40631... for reasons indicated the motion re depositions of Mr. Robert S. Arbib, Jr. under Rule 26(c)(5) is denied. So ordered. -- Metzner, J. m/n	
Jun. 18-74	Filed deft. N.Y. Times Co., Inc.'s answers to interrog. by deft. National Audubon Society, Inc.	
Jul. 17-74	Filed memo endorsed on pliff's motion to compel: This motion is marked withdrawn. See letter dated 7-16-74 So ordered. - Metzner, J.	
Jul. 24-74	Filed notice of change of address by Attorney for deft. National Audubon Society	SWC
Aug. 5-74	Filed plaintiff's affdvt. and notice of motion to consolidate 73 CIV 1727 and 73 CIV 3153 for all purposes - ret. 8-12-74	
Aug. 5-74	Filed plaintiff's memorandum of points and authorities in support of motion to consolidate.	
Sep. 30-74	Filed memo endorsed on motion to consolidate: Motion granted - (copy under 73 CIV 1727 for all purposes) So ordered -- Metzner, J. m/n	
Oct. 10-74	PRE-TRIAL CONFERENCE HELD BY Metzner, J.	

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
11-21-74	Filed plaintiff's notice to take depositions of Roland C. Clement on 11-21-74
Dec-5-74	Filed plaintiff's affidavit and notice of motion to compel discovery. ret. 12-16-74
Dec-5-74	Filed plaintiff's memorandum in support of above motion.
Dec-13-74	Filed memorandum on behalf of deft. Arbib in opposition to motion to compel.
Dec-13-74	Filed affidavit of deft. Robert S. Arbib, Jr. in opposition to pltf's motion
Dec-13-74	Filed memorandum that since this case has previously been referred to Magistrate Hartenstine for the completion of discovery and the preparation of a pretrial order, I am also referring the pltf's motion to compel to Magistrate Hartenstine to hear and report after affording the parties an opportunity for oral argument, if they so desire. So ordered. -- Metzner, J. m/n
01-10-75	Filed deft's interrogatories and Rule 34 demand.
02-13-75	Filed pltf's memorandum in support of objections of pltf. to interrog. and Rule 34 demand by deft. National Audubon Society.
02-13-75	Filed pltf's objections to deft. National Audubon Society, Inc.'s interrog. and Rule 34 demand.
02-14-75	Filed pltf's reply memorandum in support of plaintiff's motion to compel discovery.
07-24-75	RECEIVED BY JURY
08-05-75	Filed plaintiffs response to objections of defendants to the report and proposed endorsement of Magistrate Hartenstine
08-05-75	Filed objections of defendants to recommended decision of Magistrate Hartenstine.
08-05-75	Filed report and recommendations of Magistrate Hartenstine.
08-05-75	Filed memo endorsed on pltf's motion filed 12-5-74. Plaintiffs motion for production of certain handwritten notes is denied. So ordered. -- Metzner, J. m.n.
10-06-75	Filed letter by Rothwell Cappello & Berndtson, Esqs. dated 8-21-75 to Judge Metzner with memo endorsed: The attached letter dated 8-21-75 will be considered a motion for reargument. After reading the case referred to in this motion for reargument is denied. So ordered. -- Metzner, J. m/n
10-29-75	Filed pltf's notice to take depositions of Victor J. Yannacone, Jr. on 11-11-75
12-08-75	Filed defendants affidavit, statement under Rule 9(g) and notice of motion for summary judgment. - ret. 12-15-75
12-08-75	Filed defendants memorandum in support of motion for summary judgment
12-11-75	Filed memorandum of law in support of the motion of deft. NY Times Co. for summary judgment.
12-11-75	Filed by deft. NY Times Co. affidavit under Rule 9(g), affidavit and notice of motion for summary judgment.
12-19-75	Filed plaintiffs' statement of material facts as to which there exists a genuine issue to be tried.
12-19-75	Filed plaintiffs' memorandum in opposition to motions of defendants for summary judgment.
01-26-76	Filed OPINION #43779...Defendants motion for summary judgment is denied. So ordered. -- Metzner, J. m/n
1-26-76	Filed memo endorsed on deft. NY Times motion filed on 12-11-75: This motion for summary judgment is denied. See opinion #43779 on companion motion by deft. National Audubon Society, et.al. So ordered - Metzner, J. m/n
01-27-76	Filed deposition of Victor J. Yannacone, Jr. on 11-13-75
02-09-76	Filed deft. NY Times Co., Inc. affidavit and notice of motion for an order to amend the court's order of Jan. 23, 1976 etc. ret. on Feb. 18 at 10:00a.m. rm. 2201.

PROCEEDINGS

Date
Jury

Filed deft. NY Times Co. Inc. memorandum in support of the motion of deft. for amendment of order to authorize interlocutory appeal.

Filed deft. Audubon, et.al's notice of motion for reargument of motion for summary judgment. - ret. 2-18-76

Filed deft. Audubon, et.al's memorandum in support of above motion.

Filed pltf's memorandum in opposition to defts' motions for re-hearing or for certification to the Court of Appeals for the 2nd Circuit.

Filed OPINION #44251...The motion for reargument of denial of summary judgment motion by defts is granted. Upon reargument the original opinion is modified to the extent that in this motion by Defendants for summary judgment, the burden is on the pltf's to show that the defendants acted with actual malice in publishing the alleged libelous statement, etc. Consequently, the original order denying summary judgment is adhered to. The request for certification is denied. The trial will proceed on 6-3-76.

Counsel to arrange for a conference with Magistrate Hartenstein during the week of 5-10-76 for the submission of a pre-trial order. So ordered. -- Metzner, J. m/n

Filed trial memorandum of deft. The New York Times Co.

Filed proposed Voir Dire Examination submitted on behalf of deft. The New York Times Co.

Filed defts questions to be asked on the Voir Dire.

Filed proposed Voir Dire Examination submitted on behalf of deft. The New York Times Co., Inc.

Filed pltf's suggested questions for Voir Dire.

Filed requests to charge submitted on behalf of deft. The NY Times Co., Inc.

Filed Jury Instructions requested by deft. National Audubon, R. Arbib, Jr., R.C. Clement and E.J. Stahr, Jr.

Filed plaintiff's requested jury instructions.

Filed plaintiffs' pre-trial memorandum.

Jury trial begun

Jury trial continued

Jury trial continued

Jury trial continued

Jury trial continued and concluded. Motion by deft. Elvin J. Stahr to dismiss granted and all other defendants decision on motions reserved. -- Metzner, J. -- Motions to be filed in 10 days.

Jury Verdict: In favor of pltf.

Filed notice of motion by defendant Roland C. Clement for judgment notwithstanding the verdicts. - ret. 7-1-76

Filed defts memorandum in support of above motion.

Filed memorandum in support of the motion of deft. NY Times Co., Inc. for judgment notwithstanding the verdict.

Filed by deft. NY Times Co., affdvt. and notice of motion for Judgment N.E. Verdict. - ret. 7-1-76 (oral argument requested.)

Filed pltf's motion for a joint and several judgment against Audubon Society, et.al.

Filed defts memorandum in support of above motion for judgment.

Filed pltf's memorandum in opposition to defts motions for judgment notwithstanding the verdict.

Filed transcript of record of proceedings dated June 3, 4, 7, 1976.

Filed memorandum of National Audubon Society, Inc. in opposition to pltf's motion for judgment

DATE	PROCEEDINGS
07-15-76	Filed memorandum of deft. Roland C. Clements.
08-26-76	Filed Transcript of record of proceedings, dated 06-8-76
12-02-76	Filed OPINION #45411...Deft. NY Times Co.'s motion for judgment notwithstanding the verdict rendered is denied. -- Metzner, J. m/m
12-08-76	Filed OPINION #45425...Deft. Cement's motion for judgment notwithstanding the verdict rendered is denied. -- Metzner, J. m/n
12-09-76	Filed Transcript of record of proceedings 06-07-76
12-09-76	Filed memo endorsed on pliffs motion for judgment filed on 06-21-76: This motion is denied. Judgment shall be entered according to the verdict of the jury. So ordered. -- Metzner, J. m/n
01-03-77	Filed by deft. Roland C. Clement notice of appeal to the USCA from final judgment in favor of pliffs against this deft. and further appeals from orders denying this defts motion for summary judgment originally ent. on 01-26-76 and upon mot. for reargument modified by order by order ent. on 04-16-76; and also appeals from the motion for judgment notwithstanding the verdict denied by order dated 12-08-76 -- copies mailed.
01-10-77	Filed Judgment and order #77,150 that each plaintiff recover from defendants The New York Times Co. and Roland C. Clemnts: Edwards \$21,000.00 plus \$1.00 Jukes \$20,000.00 plus \$1.00 White-Stevens \$20,000.00 plus \$1.00 CLERK 01-07-77
01-17-77	Filed deft. The New York times Co. notice of appeal to the U.S.C.A. for the Second Circuit from the judgment entered on 1-7-77 and Orders of 12-2-76
	Mailed copy to Rothwell, Capello & Berndtson and Gifford, Woody Carter & Hays
02-03-77	Filed deft. Roland C. Cements amended notice of appeal from final judgment of 01-07-77 -- m/copies.
02-15-77	Filed Affidavit on appeal - \$250. - Ins. Co. of N. 4M.
Feb 22-77	Filed stipulation that certain documents be made part of the record on appeal & be transmitted to U.S.C.A.
Mar 2-77	Filed certification of record on appeal

6a

This action is consolidated for all purposes with 73 CIV 1727.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

73 CIV. 3153

JUDGE [initials]

D. C. Form No. 106 Rev.

by plts 7-17-73

TITLE OF CASE	ATTORNEYS
J. GORDON EDWARDS, Ph. D. THOMAS H. JUKES, Ph. D. ROBERT H. WHITE-STEVENS, Ph. D.	For plaintiff: ROTHWELL, CAPPELLO & BERNDTSON 1225 19th St. N.W. Washington, D.C. 20036 (202) 785 and <i>Local Counsel</i> Randolph J. Seifert 11 East 44th St. 10017 MU 2-3663
VS	
ROBERT S. ARBIB, Jr. ROLAND C. CLEMENT ELVIS J. STAHR, Jr.	
	1-16-73 co-counsel: Morris Zweibel & Crowe, McCoy, Agoglia, Congdon & Zwe
	For defendant: 80 E. Old Country Rd. Mi
	GIFFORD WOODY CARTER & HAYS 1 WALL ST N.Y., N.Y. 10005 DI-4-0470

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed x	Clerk	7/7/73	Rothwell	N
J.S. 6 mailed ✓	Marshal	7/8/73	USTL	N
Basis of Action:	Docket fee			
Defamation of Character	Witness fees			
Action arose at:	Depositions			

JULY 1973

DATE	PROCEEDINGS	Date Jury
Jul. 17-73	Filed complaint and issued summons	
8/17/73	Filed Summons and entered Marshal's Return served on Robert S. Arbiss, Jr., by Ariel S.	
"	" " " " " " " " Roland C. Clement by Clem, 8/9/73	
"	" " " " " " " " Elvis J. Stahr, Jr. by Stahr, 8/9/73	
Aug. 29-73	Filed Defts. ANSWER to the Complaint	
Sep. 7-73	Filed Notice of Motion and Supporting Affidavit, dismissing complaint returnable 9/18/73, Rm. 1506	
Sep. 7-73	Filed Memorandum on Behalf of Deft. Elvis J. Stahr, Jr. in support of Motion to dismiss complaint.	
Nov. 29-73	Filed for Pltffs Notice of Deposition of Elvis Stahr, Jr. held on 11/20/73.	
Nov. 29-73	Filed Notice of Deposition of Dr. Elvis J. Stahr, Jr. (Supplemental)	
Jan. 16-74	Filed notice of appearance for defendants by co-counsel	CWC
Aug- 5-74	Filed pltt's affdvt. of Thomas H. Jukes in opposition to motion of Deft. Stahr to dismiss.	
Aug- 5-74	Filed pltt's affdvt. and notice of motion to consolidate this motion with 73 CIV 1727 for all purposes - ret. 8-12-74	
Aug- 5-74	Filed pltt's memorandum on points and authorities in support of motion to consolidate.	
Aug- 5-74	Filed pltt's memorandum in opposition to Deft. Stahr's motion to dismiss.	
Sep-30-74	Filed memo endorsed on mot. to consolidate: Motion moot - see disposit. Filed in 73 CIV 1727. So ordered. -- Metzner, J.	
Sep-30-74	Filed Opinion written... Denying Stahr Jr.'s motion for an order to dismiss as denied for reasons indicated herein. So ordered. -- Metzner, J. m/n	
Sep- 20-74	Filed memo endorsed on motion to consolidate re 73 CIV 1727: This motion to consolidate 73 CIV 315 and 73 CIV 1727 is granted. Carried under 73 CIV 1727 for all purposes. So ordered. -- Metzner, J. m/n	
06-03-76	Jury trial begun	
06-04-76	trial continued	
06-07-76	trial continued	
06-08-76	trial continued	
06-09-76	trial continued and concluded - Jury Verdict in favor of plttfs. Motion by E.J. Stahr to dismiss is granted all other defts motions decision reserved. -- Metzner, J. By all parties - motion to be filed in 10 days.	
01-07-77	Filed Judgment and order that plaintiff E. Gordon Edwards, Ph.D. recover from defendants The New York Times Co. and Roland C. Clement the sum of \$21,000 and from deft. Roland C. Clement the additional sum of \$1.00, with interest. Ordered that pltt. Thomas H. Jukes, Ph.D. recover from defendants The NY Times Co. and Roland C. Clement the sum of \$20,000 and from deft. Roland C. Clement the additional \$1.00 with interest together with his costs. Ordered that plaintiff Robert H. White-Stevens, Ph.D. recover from defendants The NY Times Co. and Roland C. Clements the sum of \$20,000.00 and from deft. Roland C. Clements the additional \$1.00, etc. -- Clerk. (filed in 73 CIV 1727)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
J. GORDON EDWARDS, Ph.D.)

THOMAS H. JUKES, Ph.D.)

ROBERT H. WHITE-STEVENS, Ph.D.)

Plaintiffs)

v.)

NATIONAL AUDUBON SOCIETY, INC.)
950 Third Avenue)
New York, New York 10022)

and)

THE NEW YORK TIMES COMPANY, INC.)
229 W. 43rd Street)
New York, New York 10036)

Defendants)
-----x

COMPLAINT

73 CIV 1727
Civil Action No. _____

Plaintiffs Demand Jury Trial

1. This complaint is filed and these proceedings instituted pursuant to the provisions of 28 U.S.C. 1332 and as further provided by Rule 20(a) of the Federal Rules of Civil Procedure. Each of the defendants transacts business within the Southern District of New York, maintains an office and principal place of business within said District and the actions and activities complained of herein took place in part in the Southern District of New York.

2. The amount in controversy in these proceedings exceeds the sum of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs.

COUNT I

3. Plaintiff J. Gordon Edwards, Ph.D. has been and is a resident of the State of California and is engaged in

academic pursuits and scientific research in the fields of entomology and conservation.

4. Plaintiff Thomas H. Jukes, Ph.D. has been and is a resident of the State of California and is engaged in academic pursuits and scientific research in the fields of medical physics and conservation.

5. Plaintiff Robert H. White-Stevens, Ph.D. has been and is a resident of the State of New Jersey and is engaged in academic pursuits and scientific research in the fields of plant physiology and conservation.

6. Each plaintiff has a reputation, both in the United States and elsewhere as being a respected, reputable and responsible citizen and distinguished member of the academic, research and scientific communities.

7. Upon information and belief, that at all times hereinafter mentioned defendant National Audubon Society, Inc. (hereinafter Audubon) was and is a corporation having its principal place of business in New York, New York and among other things, is the publisher of a magazine American Birds, of which Robert S. Arbib, Jr. is editor.

8. Upon information and belief, that at all times hereinafter mentioned said magazine was widely circulated by defendant Audubon in the City and State of New York and throughout the United States and foreign countries generally.

9. That in the foreword to the April 1972 issue of American Birds, Vol. 26, No. 2, p. 135, a copy of which is appended

hereto as Exhibit I, defendant, its agents, servants and employees caused to be published a false, exaggerated and sensational article and the same was wrongfully, wickedly and maliciously printed and extensively circulated throughout the world, to-wit as follows:

"We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life in North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

* * * * *

"With increased local coverage by the press of Christmas Bird Count activities, it is important than (sic) Count spokesmen reiterate the simple and truthful fact that what we are seeing is the result of not more birds, but more birders. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

10. That further, in a subsequent article captioned "Pesticide Spokesmen Accused of "lying" on Higher Bird Count," under the byline of John Devlin, appearing in the August 14, 1972 edition of The New York Times, a copy of which is appended hereto as Exhibit II, defendant, its agents, servants and employees caused to be published the following false, exaggerated and sensational statements:

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

* * * * *

11a

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

* * * * *

"ACCUSED MEN NAMED

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize Winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society."

11. Additionally, that on August 14, 1972, defendant Audubon, its agents, servants and employees caused to be published to the Editor, The New York Times, a letter, a copy of which is appended hereto as Exhibit III, containing the following false, exaggerated and sensational statements:

"Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

"It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have 'better access to the Count areas, better knowledge of where to find the birds within each area; and increasing sophistication in identification.'

"This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

"Nor do we like to call people liars, but those who whave most consistently misused our data -- Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug -- certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy."

12. That the aforesaid articles and letter were published of and concerning the plaintiffs.

13. That the aforesaid articles and letter were and are false.

14. That the aforesaid articles and letter were and are malicious and defamatory.

15. Defendant Audubon has a strong self-interest in discrediting members of the scientific community, including plaintiffs herein, who raise questions as to the validity of defendant's claims and warnings about potential ecological disaster. Defendant Audubon has publicly proclaimed that its mission is "to save the world". In addition, defendant has substantially increased its membership and income during the period 1962 to 1972, which increases are attributable to said organization being the sponsor of scare mongering campaigns concerning the presence of crises in environmental and ecological matters; that defendant's motivation in libeling plaintiffs is to discredit the valid observations and statements made by plaintiffs and others that the results of defendant Audubon's Annual Christmas Bird Counts, as published, indicate a generally increasing bird population, and

thus are inconsistent with the defendant's claims that the population of many bird species is declining.

16. That on account of and by means of the publishing of the aforesaid libelous articles and letter, plaintiffs have been injured, prejudiced and damaged in their good names, personal and professional reputations and social standings in their communities. That the same has caused plaintiffs to lose the esteem and respect of their friends, their acquaintances and the public generally and did bring the plaintiffs into disrepute and deprive them of their good names, characters, reputations and social standings and has caused the plaintiffs to suffer great pain and mental anguish. That the said acts of the defendant were malicious and without justification and were done in utter disregard of plaintiffs' rights, all to their damage.

17. That by reason of the foregoing, each of the plaintiffs was damaged and is entitled to recover from the defendant National Audubon Society, Inc. the sum of One Million Dollars (\$1,000,000.00) in general damages and One Million Dollars (\$1,000,000.00) in punitive damages for a total of Six Million Dollars (\$6,000,000.00).

WHEREFORE, plaintiffs demand judgment against the defendant National Audubon Society, Inc. in the sum of Six Million Dollars (\$6,000,000.00), together with the costs and disbursements of this action.

COUNT II

18. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 6 both inclusive of this Complaint, relating to the jurisdiction of the Court and the identity of the plaintiffs, as though set forth at length herein.

19. At all times hereinafter mentioned The New York Times Company, Inc. (hereinafter New York Times) was and is a corporation whose principal place of business is in New York, New York and is owner and publisher of a daily newspaper, The New York Times, that has a very substantial local and national circulation and is also the proprietor of a supplemental media, New York Times News Service that functions as a wire service disseminating news information to other newspapers and news media.

20. That on the 14th day of August 1972 defendant New York Times, its agents, servants and employees caused to be published a false, exaggerated and sensational article, a copy of which is appended as Exhibit II, captioned "Pesticide Spokesman Accused of 'Lying' on Higher Bird Count", under the byline of John Devlin, containing the following remarks, to-wit:

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

* * * * *

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

* * * * *

"ACCUSED MEN NAMED

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel

Prize Winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society."

and the same was wrongfully, wickedly and maliciously printed and extensively circulated throughout the world.

21. That defendant New York Times by its agent John Devlin by telephone call to plaintiff, Dr. Robert White-Stevens on August 4, 1972, did inquire as to supportive evidence justifying the scientific views of plaintiffs Edwards, Jukes and White-Stevens relative to the dispute concerning the alleged changes in bird populations. Said John Devlin was then and there advised by plaintiff White-Stevens of the vast bibliography of scientific literature, authored by distinguished scientific authorities, supporting plaintiffs views; further that on August 8, 1972, six days prior to the libelous publication set forth in paragraph 20 above, plaintiff White-Stevens mailed said Devlin a letter confirming the existence of the bibliography and listing by name 18 distinguished scientists whose works support plaintiffs' views; and that in reckless disregard of this information from credible sources, defendant New York Times did publish the aforesaid libelous statements concerning plaintiffs on August 14, 1972, under circumstances wherein defendant knew or should have known said libelous statements to be false.

22. That the aforesaid article was published of and concerning the plaintiffs.

23. That the aforesaid article was false.

24. That the aforesaid article was malicious and defamatory.

25. That on account of and by means of the publishing of the aforesaid libelous articles, plaintiffs have been injured, prejudiced and damaged in their good names, personal and professional reputations and social standings in their communities. That the same has caused plaintiffs to lose the esteem and respect of their friends, their acquaintances and the public generally and did bring the plaintiffs into disrepute and deprive them of their good names, characters, reputations and social standings and has caused the plaintiffs to suffer great pain and mental anguish. That the said acts of the defendant were malicious and without justification and were done in utter disregard of plaintiffs' rights all to their damage.

26. That by reason of the foregoing, each plaintiff was damaged and each plaintiff is entitled to recover from the defendant, New York Times, the sum of One Million Dollars (\$1,000,000.00) in general damages and One Million Dollars (\$1,000,000.00) in punitive damages, for a total of Six Million Dollars (\$6,000,000.00).

WHEREFORE, plaintiffs demand judgment against the defendant, The New York Times Company, in the sum of Six Million Dollars (\$6,000,000.00), together with the costs and disbursements of this action.

Respectfully submitted,



Thomas A. Rothwell
ROTHWELL, CAPPELLO & BERNDTSON
1225 - 19th Street, N. W.
Washington, D. C. 20036
(202) 785-5020

Dated: April 13, 1973



AMERICAN BIRDS

incorporating Audubon Field Notes

17a

APRIL 1972, VOLUME 26, NUMBER 2

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Foreword

With the publication of this issue of *American Birds*, the Seventy-second Christmas Bird Count is now history. New records were again set this year, with 963 counts, and 18,798 participants. With 231 species recorded in Canada, and 583 overall, record totals in this category were also chalked up. This year, just for curiosity's sake (since there is no real meaning to the statistic) a grand total of 64,584,702 individual birds was estimated, of which large numbers were waterfowl, Starlings and blackbirds.

We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in *AMERICAN BIRDS*) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders*. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

The devoted reader will find much of topical interest in the pages of CBCs that follow; some of it highlighted

in the summary by our Christmas Count Editor, but much of it necessarily omitted for the sake of brevity. Notable incursions of Snowy Owl, Bohemian Waxwing, and all the "winter finches" were evident, especially of redpolls. It was a good year—if not the best ever—for Gyrfalcons, but Hawk Owls were conspicuously scarce. Southern and southwestern counts listed more late-lingers, especially warblers, than ever, thanks to a wet and warm autumn.

The dearth of coverage from large areas of northern Canada leaves vast gaps in our knowledge; we need observers in such frigid locales as Inuvik, Isachsen, Yellowknife, Churchill, Mousonee, Goose Bay, and other points north. There are, moreover, substantial gaps even in more populated areas. A look at the Index (back cover) will show which states and provinces are now neglected: one good count in the middle of nowhere would be far more informative than a score locked in deadly competition in adjacent and similar habitats, such as found around most metropolitan areas.

With the enormous growth in popularity of the CBC, we are fast reaching the capacity of this publication and its staff to cope. Something, quite soon, has got to give. Perhaps first to go will be counts close to others, but with inadequate coverage. Very little information of value can come from one person covering an area of 47+ square miles in one day. Actually, there should have been imposed long ago a minimum of 10 observers and 5 parties, even if this meant losing some old and faithful participants.

This coming year we will also try to cut the "fat" out of all current counts, including already-published count circle descriptions, irrelevant weather notes, and unnecessary "verification" notes. The new instructions (page 546) will give details. Perhaps contrarily, next year we are going to open, with some trepidation, the publication to CBCs from the West Indies and Central America (Mexico through Panama) reflecting our greater interest in bird study and conservation in these regions. This decision is against the better judgment of our retiring Editor, and is made with the strict proviso that accepted species names only be used. Accepted names are those used by Fieschmann, E., *The species of Middle American birds*, Trans. Linn.

Soc. N.Y., VII, 1955. Friedmann, H., L. Griscom and R. T. Moore, *Distributional Check-list of the Birds of Mexico*. Pac. Coast Avifauna 33., Cooper Ornith. Soc., Berkeley, Cal., 1957, or handbooks generally conforming to these works. The recent Mexican Field Guide by Irby Davis (Texas University Press, 1972) while of considerable merit, may not be used for nomenclature, since it differs radically from all others.

This coming year we would like one added bit of information that may be helpful in explaining winter incursions. Northern and mountain areas will be asked to note the condition of cone and berry crops: poor, fair, good, excellent (see instructions).

We do not believe that it is yet clear to all compilers that the very same count forms they return are used by typesetters to set this issue in type. Because these forms come in to us in hundreds of different personal writing and printing styles—some tiny, some neat, some sloppy, and some almost illegible—because it is a complicated form, with pages to turn, it is considered "difficult" copy, and takes longer (and costs more) than typewritten manuscript. Compilers who do not follow instructions to the letter add to our editing time and our typesetting costs. Faint pencil, blurred felt-tip pens, unacceptable abbreviations (i.e. R.-sh. Hawk) out of-order species all slow the work. But if some of the lengthiest counts come in letter perfect, so can all.

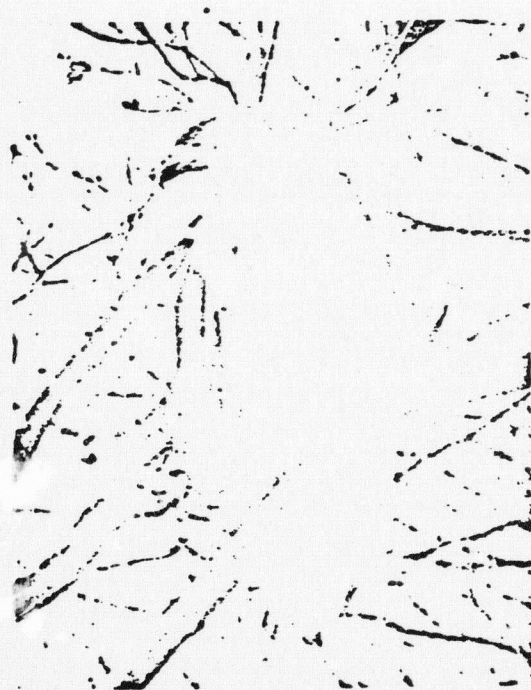
Once again, a note on the participation fee. After annual explanations for years, we still hear the occasional "Why should I have to pay for my day's birding?" The reason is simple. Without the fee, there would be no funds to print the packet of forms each compiler gets, to mail them, to edit the returned counts, to publish the CBC issue, or to mail it. No fee—no Christmas Bird Count. Even with the \$18,798 received in participation fees this year, the Christmas Bird Count still represents a deficit operation for the National Audubon Society, and an actual subsidy to every participant. Some day, perhaps, an end to the fee will be possible: the quickest way would be for every subscriber to bring in a new subscriber!

One final milestone has been reached with this issue. Allan D. Cruickshank, the eternal youth, claims that he has reached the age of 65 and will retire at year's end. This is obviously a preposterous lie, since Allan is still chasing across marshes and mudflats with all the competitive zest he exhibited only yesterday as a 20-year old. Over the years he has contributed by example and exhortation, more than anyone to the mammoth growth of this annual spectacular, and to

say that he will be replaced by a team of regional Count editors is inaccurate in one sense: he cannot be replaced; it will take a team to do his work. He himself will be a member of that team as long as he desires, which should take us well into the next century. Meanwhile, in retirement, we wish him good birding, sharp pencils, and Cocoa on top once more!

Other members of the editorial staff for this issue include our Technical Editor, Chandler S. Robbins, our arbiter of high counts, Burt L. Monroe, Jr., a new compiler of Canadian high counts, Ross Anderson, of Nova Scotia, and our good right hand, whose many services were noted last year, Lois Heilbrun.

—Robert S. Arbib, Jr.



Imm. Bald Eagle, Oradell Reservoir, N.J. Seen on Hackensack-Ridgewood CBC, Dec. 18, 1971. Photo/Stephen E. Munz.

N.Y. Times
8/14/77 p.33

19a

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

By JOHN DEVLIN

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hys-

terical," and unfounded, and Dr. Spencer said they were "almost libelous."

"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

'Serious Declines' Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contaminations; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders."

"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Servicemen Back Nixon

SAIGON, South Vietnam, Aug. 13 (AP) — The United Service Organization has reported that a straw poll of 1,051 American servicemen who visited its downtown club here from July 16 to 30 gave President Nixon 70 per cent of the votes and Senator George McGovern, 16 per cent. Eleven per cent were undecided and a 3 per cent write-in vote went mostly to Gov. George C. Wallace of Alabama.

20a



NATIONAL AUDUBON SOCIETY

950 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 532-3200 Cable: NATAUDUBON

August 14, 1972

Editor
New York Times
229 West 43d St.
New York, New York

Dear Sir:

Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification."

This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

Nor do we like to call people liars, but those who have most consistently misused our data--Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug--certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Sincerely,

(signed for Arbib by RCC after telephone consultation;
Arbib in N.Dak. at AOU)

Robert S. Arbib, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

21a

-----X
J. GORDON EDWARDS, Ph.D.)

THOMAS H. JUKES, Ph.D.)

ROBERT H. WHITE-STEVENS, Ph.D.)

Plaintiffs)

v.)

NATIONAL AUDUBON SOCIETY, INC.)
950 Third Avenue)
New York, New York 10022)

and)

THE NEW YORK TIMES COMPANY, INC.)
229 W. 23rd Street)
New York, New York 10036)

Defendants)
-----X

Civil Action No. _____

Please take notice that pursuant to Rule 4(a) of the Rules of the United State Courts there is designated the following member of the bar of this Court, having an office within the Southern District of New York, upon whom service of papers in this action may be made:

Randolph J. Seifert
11 East 44th Street
New York, New York 10017
(212) MU 2-3663

Thomas A. Rothwell
ROTHWELL, CAPPELLO & BERNDTSON
Attorneys for Plaintiffs
1225 - 19th Street, N. W.
Washington, D. C. 20036
(202) 785-5020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
J. GORDON EDWARDS, Ph.D
THOMAS H. JUKES, Ph.D.
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

v.

NATIONAL AUDUBON SOCIETY, INC.
950 Third Avenue
New York, New York 10022

and

THE NEW YORK TIMES COMPANY, INC.
229 W. 43rd Street
New York, New York 10036

Defendants.
----- x

Sgt. J. M. (9/14/73)
Rec'd
Exhibit
Entry
In Charge

73 Civ. 1727 (CMM)

ANSWER

Defendant The New York Times Company (hereinafter the "Times") by Cahill Gordon & Reindel, its attorneys, as and for its answer and affirmative defenses to plaintiffs' complaint alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the complaint except admits that the Times transacts business within the Southern District of New York, and maintains an office and principal place of business within said District.

2. Denies the allegations of paragraphs 2, 13,

14, 16, 17, 23, 24, 25 and 26 of the complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and 15 of the complaint.

4. Denies the truth of the allegations of paragraph 9 of the complaint except admits that appended as Exhibit I to the complaint is a copy of page 135 of the April, 1972 issue of American Birds, Volume 26, No. 2.

5. Denies the truth of the allegations contained in paragraph 10 of the complaint except admits that appended as Exhibit II to the complaint is a copy of an article that appeared in the August 14, 1972 edition of the Times.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint except admits that a copy of a letter dated August 14, 1972 is appended as Exhibit III to the complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint except admits that Exhibit II and III of the complaint have reference in whole or in part to the plaintiffs herein.

8. With regard to paragraph 18 of the complaint

defendant, the Times, pleads to each and every paragraph mentioned therein as previously pleaded in this answer.

9. Denies that the Times is the "proprietor" of a "supplemental media" known as the New York Times News Service; avers that the Times owns the New York Times News Service and otherwise admits the allegations of paragraph 19 of the complaint.

10. Denies the truth of the allegations contained in paragraph 20 of the complaint except admits that the article appended as Exhibit II to the complaint was published by the Times on August 14, 1972.

11. Denies the truth of the allegations contained in paragraph 21 of the complaint except admits that John Devlin did converse with plaintiff White-Stevens by telephone on August 4, 1972 in order to verify facts to be included in an article subsequently published on August 14, 1972.

12. Denies the truth of the allegations contained in paragraph 22 of the complaint and further avers that the article appended as Exhibit II to the complaint makes reference to the plaintiffs.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE:

13. The complaint fails to state a cause of action upon which relief may be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE:

14. The action is barred by the First and Fourteenth Amendments to the Constitution of the United States.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE:

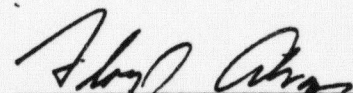
15. The article referred to in the complaint was published by defendant, the Times, in the regular course of business, in the belief that the same was true and without malice towards plaintiffs and was based upon information communicated to defendant by reliable persons and from trustworthy sources.

WHEREFORE, the defendant, the Times, demands judgment dismissing the complaint and its costs and disbursements of this action.

Dated, New York, New York
May 4, 1973

CAHILL GORDON & REINDEL

By



A Member of the Firm
Attorneys for Defendant,
The New York Times Com-
pany

Office & P.O. Address
80 Pine Street
New York, New York 10005
(212) 944-7400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

26a

----- x

J. GORDON EDWARDS, et al., :

Plaintiffs, :

-against- :

NATIONAL AUDUBON SOCIETY, INC., :
et ano, :

Defendants. :

----- x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 21 years and not a party to
this action.

2. On the 14th day of May, 1973, I served the
annexed Answer upon:

Randolph J. Seifert, Esq.
11 East 44th Street
New York, New York

by causing a true and correct copy thereof to be deposited in
the Post Office regularly maintained by the United States
Government at 73 Pine Street, New York, New York 10005,
enclosed in a stamped, sealed wrapper and addressed to said
attorney at the address above mentioned.

Robert R. Cawthra

Sworn to before me this

15 day of May, 1973

Katherine H. W. Swift
Notary Public

KATHERINE H. W. SWIFT
Notary Public, State of New York
No. 31-0268000
Certificate filed in New York County
Commission Expires March 30, 1974

BEST COPY AVAILABLE

27a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, PH. D.
THOMAS H. JUKES, PH. D.
ROBERT H. WHITE-STEVENS, PH. D.,

Plaintiffs,

73 Civ. 1727
C.M.M.

v.

NATIONAL AUDUBON SOCIETY, INC.
950 Third Avenue
New York, New York 10022

ANSWER

and

THE NEW YORK TIMES COMPANY, INC.
229 W. 43rd Street
New York, New York 10036

Defendants.

Defendant NATIONAL AUDUBON SOCIETY, INC. (Herein-
after called "AUDUBON"), by its attorneys, GIFFORD, WOODY,
CARTER & HAYS and BIGHAM ENGLAR JONES & HOUSTON, answering
the Complaint:

I. It denies knowledge or information sufficient
to form a belief as to the truth of the allegations of Para-
graph 1 of the Complaint as regards diversity of citizenship
between plaintiffs and defendants under Title 28 U.S. 1332 in
that it does not know of which States plaintiffs are citizens,
and, except as so denied, admits the allegations of Paragraphs
1 and 2 of the Complaint.

II. It denies knowledge or information sufficient
to form a belief as to the allegations of Paragraphs 3, 4 and
5 of the Complaint.

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Diary	m2
In Charge	J.R.

III. It denies the allegations of Paragraph 6 of the Complaint.

IV. It admits the allegations of Paragraphs 7 and 8 of the Complaint.

V. It admits the publication of the foreword to the April, 1972, issue of American Birds, a copy of which is annexed to the Complaint as Exhibit I, and refers to said foreword for the contents thereof, and except as so admitted, denies the allegations of Paragraph 9 of the Complaint.

VI. It denies that it, its agents, servants or employees, caused, participated in or authorized the publication of the article referred to in Paragraph 10 of the Complaint as having appeared in the August 14, 1972, edition of The New York Times, denies the characterizations of the aforesaid foreword to the April, 1972, issue of American Birds appearing in that New York Times article as quoted in paragraph 10 of the Complaint, admits that the article annexed to the Complaint as Exhibit II was published in the August 14, 1972, edition of The New York Times, and except as so admitted or denied, denies each and every allegation of Paragraph 10 of the Complaint.

VII. It admits that there was prepared for mailing to the Editor of The New York Times a letter dated August 14, 1972, a copy of which is annexed to the Complaint as Exhibit III, refers to said letter for the contents thereof, and except as so admitted denies each and every allegation of Paragraph 11 of the Complaint.

VIII. It refers to the aforesaid articles and letter for the contents thereof, and except as so referred, denies

each and every allegation of Paragraph 12 of the Complaint.

IX. It denies each and every allegation of Paragraphs 13 and 14 of the Complaint, except that it admits the said New York Times article was incorrect in its characterization of said article in American Birds and certain statements attributed to Mr. Arbib, and except that it denies knowledge or information sufficient to form a belief as to the state of mind of The New York Times.

X. It admits that it has substantially increased its membership and income during the period 1962 to 1972, and, except as so admitted, denies each and every allegation of Paragraph 15 of the Complaint.

XI. It denies each and every allegation of Paragraphs 16 and 17 of the Complaint.

FIRST DEFENSE

XII. The Complaint fails to state a claim upon which relief can be granted against defendant Audubon.

SECOND DEFENSE

XIII. The statements appearing in the April, 1972, foreword to American Birds, as a matter of law, are not susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons; the article appearing in the August 14, 1972, edition of The New York Times was and is not a publication by, or imputable to, defendant Audubon, and the unpublished August 14, 1972, letter from defendant Audubon to the Editor of The New York Times contains no matter reasonably susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons.

THIRD DEFENSE

XIV. None of the articles or letters referred to in the Complaint which deal with disputed interpretations of the significance of certain Christmas Bird Counts conducted by members of defendant Audubon to the pesticide controversy are sufficient in law to constitute libel per se, and the Complaint does not allege special damages.

FOURTH DEFENSE

XV. To the extent that any of the publications of defendant Audubon referred to in the Complaint included comments or expressions of opinion, said comments or expressions of opinion concerned a matter of public interest, were based upon facts truly stated, represented the honest opinion of defendant Audubon, and were in no sense motivated by actual malice.

FIFTH DEFENSE

XVI. All publications of defendant Audubon referred to in the Complaint, to the extent they included statements of fact, were in all respects true.

SIXTH DEFENSE

XVII. To the extent that the publications of defendant Audubon referred to in the Complaint were of and concerning plaintiffs, or any of them, said publications related to the involvement of plaintiffs in events of public or general concern, namely, the effect of certain pesticides upon our environment, and were published in the belief that the statements made therein were true and were published without actual malice, and are accordingly protected and privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

SEVENTH DEFENSE

IVIII. That the maintenance and assertion of the claims set forth in Count I of the Complaint are barred in whole or in part by the applicable statutes of limitations.

WHEREFORE, defendant Audubon demands that judgment be entered dismissing the Complaint herein and awarding it the costs and disbursements of this action.

GIFFORD, WOODY, CARTER & HAYS

By CHARLES L. TROWBRIDGE

Charles L. Trowbridge
A Member of the Firm
Attorneys for Defendant
National Audubon Society, Inc.
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New York, New York 10005
(212) 344-0470

BIGHAM ENGLAR JONES & HOUSTON

By JOHN L. QUINLAN

John L. Quinlan
A Member of the Firm
Attorneys for Defendant
National Audubon Society, Inc.
Office and P. O. Address
99 John Street
New York, New York 10038
(212) 732-4646

32a

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Diary		
In Charge		
Plaintiffs		

Edward
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, PH. D.
THOMAS H. JUKES, PH. D.
ROBERT H. WHITE-STEVENS, PH. D.

73 Civ. 1727
C.M.N.

v.

NATIONAL AUDUBON SOCIETY, INC.
950 Third Avenue
New York, New York 10022

and

THE NEW YORK TIMES COMPANY, INC.
229 W. 43rd Street
New York, New York 10036

AMENDED
ANSWER

Defendants.

Defendant NATIONAL AUDUBON SOCIETY, INC. (herein-
after called "AUDUBON"), by its attorneys, GIFFORD, WOODY,
CARTER & HAYS and BIGHAM ENGLAR JONES & HOUSTON, for its
Amended Answer to the Complaint:

FIRST: Denies that it has any knowledge or
information sufficient to form a belief as to the allegations
contained in the paragraph of the Complaint designated "1",
except that it admits that it transacts business within the
Southern District of New York and maintains an office and
place of business within said District and that the actions
and activities referred to in the Complaint took place, in
part, in said District.

SECOND: Denies each and every allegation contain-
ed in the paragraphs of the Complaint designated "2", "8",
"9", "10", "12", "13", "14", "15", "16" and "17".

THIRD: Denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "3", "4", "5" and "6".

FOURTH: Denies each and every allegation contained in the paragraph of the Complaint designated "11", except that it admits that it prepared for mailing to the New York Times a letter, copy of which is annexed to the Complaint as Exhibit III.

FIRST DEFENSE

FIFTH: The Complaint fails to state a claim upon which relief can be granted against defendant Audubon.

SECOND DEFENSE

SIXTH: The statements appearing in the April, 1972, foreword to American Birds, as a matter of law, are not susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons; the article appearing in the August 14, 1972, edition of The New York Times was and is not a publication by, or imputable to, defendant Audubon, and the unpublished August 14, 1972, letter from defendant Audubon to the Editor of The New York Times contains no matter reasonably susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons.

THIRD DEFENSE

SEVENTH: None of the articles or letters referred to in the Complaint which deal with disputed interpretations of the significance of certain Christmas Bird Counts conducted

by members of defendant Audubon to the pesticide controversy are sufficient in law to constitute libel per se, and the Complaint does not allege special damages.

FOURTH DEFENSE

EIGHTH: To the extent that any of the publications of defendant Audubon referred to in the Complaint included comments or expressions of opinion, said comments or expressions of opinion concerned a matter of public interest, were based upon facts truly stated, represented the honest opinion of defendant Audubon, and were in no sense motivated by actual malice.

FIFTH DEFENSE

NINTH: All publications of defendant Audubon referred to in the Complaint, to the extent they included statements of fact, were in all respects true.

SIXTH DEFENSE

TENTH: To the extent that the publications of defendant Audubon referred to in the Complaint were of and concerning plaintiffs, or any of them, said publications related to the involvement of plaintiffs in events of public or general concern, namely, the effect of certain pesticides upon our environment, and were published in the belief that the statements made therein were true and were published without actual malice, and are accordingly protected and privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

SEVENTH DEFENSE

ELEVENTH: That the maintenance and assertion of the claims set forth in Count I of the Complaint are barred in

whole or in part by the applicable statutes of limitations.

WHEREFORE, defendant Audubon demands that judgment be entered dismissing the Complaint herein and awarding it the costs and disbursements of this action.

GIPFORD, WOODY, CARTER & HAYS

By 15/Charles Traub

A Member of the Firm
Attorneys for Defendant
NATIONAL AUDUBON SOCIETY, INC.
Office & P. O. Address
One Wall Street
New York, New York 10005
212 344-0470

BIGHAM ENGLAR JONES & HOUSTON

By 15/John B. Jones

A Member of the Firm
Attorneys for Defendant
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99 John Street
New York, New York 10038
212 732-4646

36a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CIV. 3153

J. GORDON EDWARDS, Ph.D.

THOMAS H. JUKES, Ph.D.

ROBERT H. WHITE-STEVENS, Ph.D.

Plaintiffs

v.

ROBERT S. ARBIB, Jr.
950 Third Avenue
New York, New York, 10022

ROLAND C. CLEMENT
950 Third Avenue
New York, New York 10022

and

ELVIS J. STAHR, Jr.
950 Third Avenue
New York, New York 10022

COMPLAINT

Civil Action No. _____

Plaintiffs Demand Jury Trial

FILED
U.S. DISTRICT COURT
JUL 17 2 41 PM '73
SOUTHERN DISTRICT OF NEW YORK

1. This complaint is filed and these proceedings instituted pursuant to the provisions of 28 U.S.C. 1332 and as further provided by Rule 20(a) of the Federal Rules of Civil Procedure. Each of the defendants is employed and is present within the Southern District of New York.

2. The amount in controversy in these proceedings exceeds the sum of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs.

3. Plaintiff J. Gordon Edwards, Ph.D. has been and is a resident of the State of California and is engaged in

academic pursuits and scientific research in the fields of entomology and conservation.

4. Plaintiff Thomas H. Jukes, Ph.D. has been and is a resident of the State of California and is engaged in academic pursuits and scientific research in the fields of medical physics and conservation.

5. Plaintiff Robert H. White-Stevens, Ph.D. has been and is a resident of the State of New Jersey and is engaged in academic pursuits and scientific research in the fields of plant physiology and conservation.

6. Each plaintiff has a reputation, both in the United States and elsewhere as being a respected, reputable and responsible citizen and distinguished member of the academic, research and scientific communities.

7. On information and belief, defendant Elvis Stahr is a resident of Greenwich, County of Fairfield, State of Connecticut, and is President of the National Audubon Society, Inc. (hereinafter Audubon) a corporation having its principal place of business in New York, New York.

8. On information and belief, defendant Roland C. Clement is a resident of Norwalk, County of Fairfield, State of Connecticut, and is Vice President of said Audubon.

9. On information and belief, defendant Robert S. Arbib, Jr. is a resident of Mamaroneck, County of Westchester, State of New York, and is editor of the magazine AMERICAN BIRDS, owned and published in New York, New York by said Audubon.

10. Upon information and belief, that at all times hereinafter mentioned said magazine AMERICAN BIRDS was widely circulated by Audubon in the City and State of New York and throughout the United States and foreign countries generally.

11. That in the foreword to the April 1972 issue of AMERICAN BIRDS, Vol. 26, No. 2, p. 135, a copy of which is appended hereto as Exhibit I, defendants caused to be published a false, exaggerated and sensational article and the same was wrongfully, wickedly, and maliciously printed and extensively circulated throughout the world, to-wit, as follows:

"We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life in North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

* * * * *

"With increased local coverage by the press of Christmas Bird Count activities, it is important than (sic) Count spokesmen reiterate the simple and truthful fact that what we are seeing is the result of not more birds, but more birders. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

12. That further, in a subsequent article captioned "Pesticide Spokesmen Accused of 'lying' on Higher Bird Count," under the byline of John Devlin, appearing in the August 14, 1972 edition of The New York Times, a copy of which is appended hereto as Exhibit II, defendants caused to be published the following false, exaggerated and sensational statements:

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

* * * * *

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

* * * * *

"ACCUSED MEN NAMED

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize Winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society."

13. Additionally, that on August 14, 1972, defendants caused to be published to the Editor, The New York Times, a letter, a copy of which is appended hereto as Exhibit III, containing the following false, exaggerated and sensational statements:

"Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

"It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have 'better access to the Count areas, better knowledge of where to find the birds within each area; and increasing sophistication in identification.'

"This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

"Nor do we like to call people liars, but those who have most consistently misused our data -- Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug -- certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy."

14. That the aforesaid articles and letters were published of and concerning the plaintiffs.

15. That the aforesaid articles and letter were and are false.

16. That the aforesaid articles and letter were and are malicious and defamatory.

17. Defendants, as paid employees of Audubon, have strong self-interest in discrediting members of the scientific community, including plaintiffs herein, who raise questions as to the validity of Audubon's claims and warnings about potential ecological disaster. Audubon has publicly proclaimed that its objective is "quite literally to save the world". In addition, Audubon has substantially increased its membership and income during the period 1962 to 1972, which increases are attributable to said organization being the sponsor of scare mongering campaigns concerning the presence of crises in environmental and ecological matters; that defendants' motivation in libeling plaintiffs is to discredit the valid observations and statements made by plaintiffs and others that the results of Audubon's Annual Christmas Bird

Counts, as published, indicate a generally increasing bird population, and thus are inconsistent with the Audubon's claims that the population of many bird species is declining.

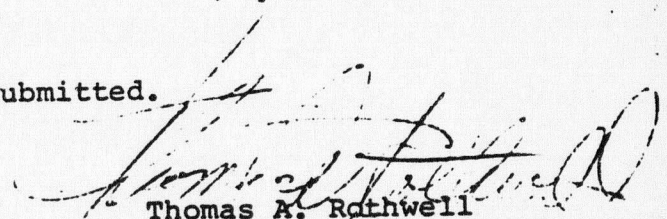
18. That on account of and by means of the publishing of the aforesaid libelous articles and letter, plaintiffs have been injured, prejudiced and damaged in their good names, personal and professional reputations and social standings in their communities. That the same has caused plaintiffs to lose the esteem and respect of their friends, their acquaintances and the public generally and did bring the plaintiffs into disrepute and deprive them of their good names, characters, reputations and social standings and has caused the plaintiffs to suffer great pain and mental anguish. That the said acts of the defendants were malicious and without justification and were done in utter disregard of plaintiffs' rights, all to their damage.

19. That by reason of the foregoing, each of the plaintiffs was damaged and is entitled to recover from the defendants, jointly and severally, the sum of One Million Dollars (\$1,000,000.00) in general damages and One Million Dollars (\$1,000,000.00) in punitive damages for a total of Six Million Dollars (\$6,000,000.00).

WHEREFORE, plaintiffs demand judgment against the defendants, jointly and severally, in the sum of Six Million Dollars (\$6,000,000.00), together with the costs and disbursements of this action.

Respectfully submitted.

Randolph J. Seifert
11 East 44th Street
New York, New York 10017
212-MU 2-3663
Attorney for Plaintiffs


Thomas A. Rothwell
Rothwell, Cappello & Berndtson
1225 - 19th Street, N. W.
Washington, D. C. 20036
202-785-5025
Attorneys for Plaintiffs

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Foreword

With the publication of this issue of *American Birds*, the Seventy-second Christmas Bird Count is now history. New records were again set this year, with 963 counts, and 18,798 participants. With 231 species recorded in Canada, and 583 overall, record totals in this category were also chalked up. This year, just for curiosity's sake (since there is no real meaning to the statistic) a grand total of 64,584,702 individual birds was estimated, of which large numbers were waterfowl, Starlings and blackbirds.

We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in *AMERICAN BIRDS*) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders*. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

The devoted reader will find much of topical interest in the pages of CBCs that follow; some of it highlighted

in the summary by our Christmas Count Editor, but much of it necessarily omitted for the sake of brevity. Notable incursions of Snowy Owl, Bohemian Waxwing, and all the "winter finches" were evident, especially of redpolls. It was a good year—if not the best ever—for Gyrfalcons, but Hawk Owls were conspicuously scarce. Southern and southwestern counts listed more late-lingerers, especially warblers, than ever, thanks to a wet and warm autumn.

The dearth of coverage from large areas of northern Canada leaves vast gaps in our knowledge; we need observers in such frigid locales as Inuvik, Isachsen, Yellowknife, Churchill, Moosonee, Goose Bay, and other points north. There are, moreover, substantial gaps even in more populated areas. A look at the Index (back cover) will show which states and provinces are now neglected; one good count in the middle of nowhere would be far more informative than a score locked in deadly competition in adjacent and similar habitats, such as found around most metropolitan areas.

With the enormous growth in popularity of the CBC, we are fast reaching the capacity of this publication and its staff to cope. Something, quite soon, has got to give. Perhaps first to go will be counts close to others, but with inadequate coverage. Very little information of value can come from one person covering an area of 47+ square miles in one day. Actually, there should have been imposed long ago a minimum of 10 observers and 5 parties, even if this meant losing some old and faithful participants.

This coming year we will also try to cut the "fat" out of all current counts, including already-published count circle descriptions, irrelevant weather notes, and unnecessary "verification" notes. The new instructions (page 546) will give details. Perhaps contrarily, next year we are going to open, with some trepidation, the publication to CBCs from the West Indies and Central America (Mexico through Panama) reflecting our greater interest in bird study and conservation in these regions. This decision is against the better judgment of our retiring Editor, and is made with the strict proviso that accepted species names only be used. Accepted names are those used by Eisenmann, E., *The species of Middle American birds*, Trans. Linn.

See S. Y. Aitken, *The Field Guide to Birds*, H. F. Gossom and R. L. Moore, *Field Guide and Checklist of the Birds of Mexico, the Coast, and the Gulf*, U. S. Cooper Ornith. Soc., Berkeley, Cal., 1957, or handbooks generally conforming to these works. The recent Mexican Field Guide by Irby Davis (Texas University Press, 1972) while of considerable merit, may not be used for nomenclature, since it differs radically from all others.

This coming year we would like one added bit of information that may be helpful in explaining winter incursions. Northern and mountain areas will be asked to note the condition of cone and berry crops: poor, fair, good, excellent (see instructions).

We do not believe that it is yet clear to all compilers that the very same count forms they return are used by typesetters to set this issue in type. Because these forms come in to us in hundreds of different personal writing and printing styles—some tiny, some neat, some sloppy, and some almost illegible—because it is a complicated form, with pages to turn, it is considered "difficult" copy, and takes longer (and costs more) than typewritten manuscript. Compilers who do not follow instructions to the letter add to our editing time and our typesetting costs. Faint pencil, blurred felt-tip pens, unacceptable abbreviations (i.e. R-sh. Hawk) out-of-order species all slow the work. But if some of the lengthiest counts come in letter perfect, so can all.

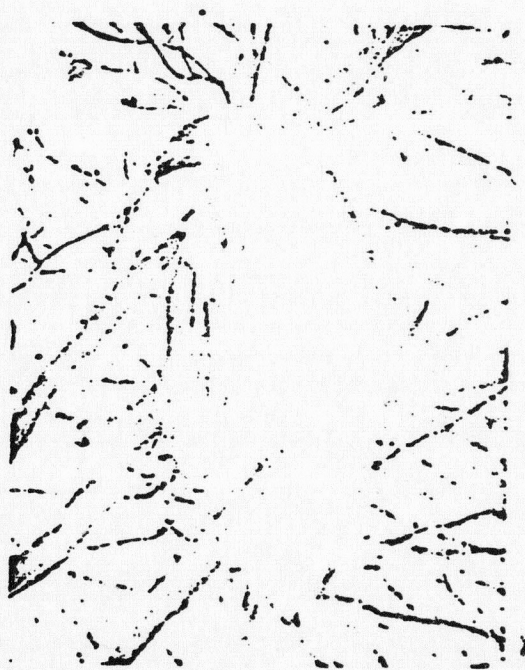
Once again, a note on the participation fee. After annual explanations for years, we still hear the occasional "Why should I have to pay for my day's birding?" The reason is simple. Without the fee, there would be no funds to print the packet of forms each compiler gets, to mail them, to edit the returned counts, to publish the CBC issue, or to mail it. No fee—no Christmas Bird Count. Even with the \$18,798 received in participation fees this year, the Christmas Bird Count still represents a deficit operation for the National Audubon Society, and an actual subsidy to every participant. Some day, perhaps, an end to the fee will be possible; the quickest way would be for every subscriber to bring in a new subscriber!

One final milestone has been reached with this issue. Allan D. Cruickshank, the eternal youth, claims that he has reached the age of 65 and will retire at year's end. This is obviously a preposterous lie, since Allan is still chasing across marshes and mudflats with all the competitive zest he exhibited only yesterday as a 20-year old. Over the years he has contributed by example and exhortation, more than anyone to the mammoth growth of this annual spectacular, and to

say that he will be replaced by a team of regional Count editors is inaccurate in one sense: he cannot be replaced; it will take a team to do his work. He himself will be a member of that team as long as he desires, which should take us well into the next century. Meanwhile, in retirement, we wish him good birding, sharp pencils, and Cocoa on top once more!

Other members of the editorial staff for this issue include our Technical Editor, Chandler S. Robbins, our arbiter of high counts, Burt L. Monroe, Jr., a new compiler of Canadian high counts, Ross Anderson, of Nova Scotia, and our good right hand, whose many services were noted last year, Lois Heilbrun.

—Robert S. Arbib, Jr.



Imm. Bald Eagle, Oradell Reservoir, N.J. Seen on Hackensack-Ridgewood CBC, Dec. 18, 1971. Photo/Stephen E. Munz.



NATIONAL AUDUBON SOCIETY

950 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 532-3200 Cable: NATAUDUBON

August 14, 1972

Editor
New York Times
229 West 43d St.
New York, New York

Dear Sir:

Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have "better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification."

This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

Nor do we like to call people liars, but those who have most consistently misused our data--Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug--certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Sincerely,

(signed for Arbib by RCC after telephone consultation;
Arbib in N.Dak. at AOU)

Robert S. Arbib, Jr.

EXHIBIT III

N.Y. Times
8/14/77 p.33

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

By JOHN DEVLIN

"Segments of the pesticide industry and certain 'scientist-spokesmen,'" are accused in the current issue of American Birds of "lying" by saying that bird life in North America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hy-

sterical," and unfounded, and Dr. Spencer said they were "almost libelous."

"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen'"

are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

'Serious Declines' Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders."

"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Servicemen Back Nixon

SAIGON, South Vietnam, Aug. 13 (AP) — The United Service Organization has reported that a straw poll of 1,051 American servicemen who visited its downtown club here from July 15 to 30 gave President Nixon 70 per cent of the votes and Senator George McGovern, 16 per cent. Eleven per cent were undecided and a 3 per cent write-in vote went mostly to Gov. George C. Wallace of Alabama.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

46a

-----X
J. GORDON EDWARDS, PH.D. : 73 Civ. 3153
THOMAS H. JUKES, PH.D. : C.M.M.
ROBERT H. WHITE-STEVENSON, PH.D., :

Plaintiffs, :

v. :

: ANSWER

ROBERT S. ARBIB, JR. :
950 Third Avenue :
New York, New York 10022; :
ROLAND C. CLEMENT :
950 Third Avenue :
New York, New York 10022; :
ELVIS J. STAHR, JR. :
950 Third Avenue :
New York, New York 10022, :

Defendants. :
-----X

Defendants Roland C. Clement and Robert S. Arbib, Jr. by their attorneys Gifford, Woody, Carter & Hays for their answer to the complaint allege as follows:

FIRST: They deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the complaint designated "1", except that they admit that they are employed and are within the Southern District of New York.

SECOND: They deny each and every allegation contained in the paragraphs of the complaint designated "2", "10", "11", "12", "14", "15", "16", "17", "18" and "19".

THIRD: They deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "3", "4", "5" and "6".

FOURTH: They deny each and every allegation contained in the paragraph of the complaint designated "13", except that they admit they participated in the

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preparation for mailing to the New York Times of a letter a copy of which is annexed to the complaint as Exhibit III.

FIRST DEFENSE

FIFTH: The complaint fails to state a claim upon which relief can be granted against defendants.

SECOND DEFENSE

SIXTH: The statements appearing in the April, 1972, foreword to American Birds, as a matter of law, are not susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons; the article appearing in the August 14, 1972, edition of The New York Times was and is not a publication by, or imputable to, defendants, and the unpublished August 14, 1972, letter from defendants to the Editor of The New York Times contains no matter reasonably susceptible of a defamatory meaning of and concerning any ascertainable person or group of persons.

THIRD DEFENSE

SEVENTH: None of the articles or letters referred to in the complaint which deal with disputed interpretations of the significance of certain Christmas Bird Counts conducted by defendants to the pesticide controversy are sufficient in law to constitute libel per se, and the complaint does not allege special damages.

FOURTH DEFENSE

EIGHTH: To the extent that any of the publications of defendants referred to in the complaint included comments or expressions of opinion, said comments or expressions of opinion concerned a matter of public interest, were based upon facts truly stated, represented the honest opinion of defendants, and were in no sense

motivated by actual malice.

FIFTH DEFENSE

NINTH: All publications of defendants referred to in the complaint, to the extent they included statements of fact, were in all respects true.

SIXTH DEFENSE

TENTH: To the extent that the publications of defendants referred to in the complaint were of and concerning plaintiffs, or any of them, said publications related to the involvement of plaintiffs in events of public or general concern, namely, the effect of certain pesticides upon our environment, and were published in the belief that the statements made therein were true and were published without actual malice, and are accordingly protected and privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

SEVENTH DEFENSE

ELEVENTH: That the maintenance and assertion of the claims set forth in Count I of the complaint are barred in whole or in part by the applicable statutes of limitations.

WHEREFORE, defendants demand that judgment be entered dismissing the complaint herein and awarding them the costs and disbursements of this action.

GIFFORD, WOODY, CARTER & HAYS

By Charles F. Trawick
A Member of the Firm

Attorneys for Defendants
Roland C. Clement and
Robert S. Arbib, Jr.
Office and P. O. Address
One Wall Street
New York, New York 10005
(212) 344-0470

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

49a

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J. GORDON EDWARDS, Ph.D., :
THOMAS H. JUKES, Ph.D. :
ROBERT H. WHITE-STEVENSON, Ph.D., :

73 Civ. 1927 (CMM)

Plaintiffs, :

-against-

: NOTICE OF MOTION AND MOTION
: FOR SUMMARY JUDGMENT MADE
: ON BEHALF OF THE NEW YORK
: TIMES COMPANY, INC.

NATIONAL AUDUBON SOCIETY, INC., :
THE NEW YORK TIMES COMPANY, INC., :
ROBERT S. ARBIB, JR., :
ROLAND C. CLEMENT, :
ELVIS J. STAHR, JR., :

ORAL ARGUMENT
REQUESTED

Defendants. :

- - - - - x

S I R S :

PLEASE TAKE NOTICE that upon Court II of the complaint herein, the annexed affidavit of Floyd Abrams, Esq., sworn to December 5, 1975 and the accompanying Memorandum in Support of Defendant's Motion for Summary Judgment, defendant, The New York Times Company, Inc., by its attorneys, will move this Court in Room 2201 of the United States Courthouse, Foley Square, New York, New York, on December 15, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting defendant The New York Times Company, Inc. summary judgment and dismissing Court II of the complaint; for the costs and disbursements of this action; and for such other

50a

and further relief as to this Court may seem just and proper.

Dated: New York, New York
December 5, 1975

Yours, etc.,

CAHILL GORDON & REINDEL

By _____
A Member of the Firm
Attorneys for Defendant,
The New York Times Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

TO:

ROTHWELL, CAPELLO & BERNDTSON
Attorneys for Plaintiffs
1225 19th Street, N.W.
Washington, D. C. 20036
(202) 785-5025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

51a

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J. GORDON EDWARDS, PH.D.,	:	
THOMAS H. JUKES, PH.D.,	:	
ROBERT H. WHITE-STEVENSON, Ph.D.,	:	
Plaintiffs,	:	73 Civ. 1927 (CMM)
-against-	:	STATEMENT PURSUANT
NATIONAL AUDUBON SOCIETY, INC.,	:	TO RULE 9(g) OF THE
THE NEW YORK TIMES COMPANY, INC.,	:	<u>GENERAL RULES</u>
ROBERT S. ARBIB, JR.,	:	
ROLAND C. CLEMENT,	:	
ELVIS J. STAHR, JR.,	:	
Defendants.	:	

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This statement is submitted on behalf of The New York Times Company, Inc., pursuant to Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York. The New York Times Company, Inc. contends that as to the material facts listed below, there is no genuine issue to be tried:

1. That on August 14, 1972, The New York Times ("the Times"), the daily newspaper published by The New York Times Company, Inc., published an article by John Devlin, a Times reporter, bearing the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." (A copy of that Times article is annexed as Exhibit A to the accompanying affidavit of Floyd Abrams.)

2. That the August 14, 1972 Times article quoted from the forward to the April 1972 issue of American Birds, a

publication of the National Audubon Society ("Audubon") in collaboration with the United States Fish & Wildlife Service, written by Robert S. Arbib, Jr., editor of that publication, and also from a separate interview with Mr. Arbib. (A copy of the American Birds forward by Mr. Arbib is annexed as Exhibit B to the accompanying affidavit of Floyd Abrams.)

3. That the August 14, 1972 Times article concerned differing interpretations of Audubon's "Christmas Bird Count" data, and the issue of whether the North American bird population has been harmed by the use of DDT (dichlorodiphenyltrichloroethane) and other pesticides.

4. That the August 14, 1972 Times article referred to Drs. J. Gordon Edwards, Thomas H. Jukes and Robert H. White-Stevens, all plaintiffs herein.

5. That for at least 25 years, there has raged a heated public controversy between proponents and opponents of the widespread use of the insecticide DDT and other pesticides. This controversy is a matter of significant public interest and concern.

6. That plaintiffs and Audubon, another defendant in this action, have voluntarily participated in this public controversy, and have repeatedly expressed their views publicly.

7. That plaintiffs and defendant Audubon have publicly disagreed over what are and what are not scientifically justifiable interpretations of Audubon's annual Christmas Bird Count data.

8. That it is in the context of the public controversy over DDT and the related public controversy over the significance of Audubon's Christmas Bird Count data that the allegedly defamatory statements of which plaintiffs complain, were made.

9. That each of plaintiffs is, and must be viewed in the context of this action as a public figure.

10. That the names of plaintiffs did not appear in the aforesaid April 1972 edition of American Birds, but were provided to Mr. Devlin, the Times reporter, by Mr. Arbib of Audubon.

11. That Mr. Devlin communicated with no person at Audubon other than Mr. Arbib in connection with the portion of the article Mr. Devlin wrote, and Mr. Arbib made no statement to Mr. Devlin in the course of their telephone conversation which did anything more than identify the named individuals as among the persons described in the aforesaid forward to American Birds.

12. That none of the utterances of defendant The New York Times Company, Inc. of which plaintiffs complain were false, but if said utterances are later found to be false, none were known or believed by said defendant to be false or were published by said defendant with reckless disregard of their truth or falsity, but Mr. Devlin and the Times believed and had no doubt that their article was a fair

54a

and accurate report of the information furnished by the American
Birds forward and Mr. Arbib.

Dated: New York, New York
December 5, 1975

Yours, etc.,

CAHILL GORDON & REINDEL
Attorneys for the Defendant,
The New York Times Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

55a

J. GORDON EDWARDS, Ph.D.,
THOMAS H. JUKES, Ph.D., and
ROBERT H. WHITE-STEVENSON, Ph.D.,

AFFIDAVIT

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT, and
ELVIS J. STAHR, Jr.,

Defendants. :

2. As more fully described in the accompanying memorandum of law, the basis of this libel action is an article entitled "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count" which appeared in the August 14, 1972 editions of the New York Times (the "Times"), the daily newspaper published by

defendant. (A copy of that article is annexed hereto as Exhibit A.) That article concerned differing interpretations of "Christmas Bird Count" data compiled by the National Audubon Society, Inc. ("Audubon") another defendant herein.

3. In reporting on this controversy, the August 14, 1972 Times article quoted from a forward to the April 1972 issue of American Birds, an Audubon publication, written by Robert S. Arbib, editor of that magazine and from a separate interview with Mr. Arbib. (A copy of the American Bird forward is annexed hereto as Exhibit B.) It also mentioned the names of plaintiffs herein, Drs. J. Gordon Edwards, Thomas H. Jukes and Robert H. White-Stevens.

4. In Count II of the complaint filed herein, it is alleged that the Times article of August 14, 1972 libeled the plaintiffs and was published with malice. Since no accusations are made against the Times in the first count of that complaint, the granting of the present motion for summary judgment as to the second count of the complaint would result in the dismissal of the Times as a party to this action.

5. The present motion is based on the constitutional protection afforded the "Times" due to plaintiffs' status as "public figures". The plaintiffs herein are eminent scientists and authors having well-recognized names in the academic community. Dr. Edwards is professor of entomology at the University of California at San Jose. Dr. Jukes is professor of medical

physics at the University of California at Berkeley and Dr. White-Stevens is professor of biology and chairman of the Bureau of Conservation and Environmental Science at Rutgers University. Because of their professional prominence and prolific writings, plaintiffs are without doubt public figures.

6. An additional basis for classifying plaintiffs as public figures is their prominence in the particular public controversy which is the subject matter of the article involved in this action. Each of the plaintiffs has thrust himself to the forefront of the heated public debate over the use of DDT (dichlorodiphenyltrichloroethane) and other pesticides, through lectures, participation in public debates and publications. Each has affirmatively sought out opportunities to influence the outcome of the DDT controversy, including the debate over DDT's effect on birds.

7. Indeed, plaintiffs' status as public figures has undoubtedly increased their ability to air their views in the media and to keep such views before the public at all times. Indicative of this improved opportunity for publicity are the press release entitled "Audubon Society and N.Y. Times Sued for \$12 Million," issued by plaintiffs in New York on April 18, 1973 and a Barron's article dated November 10, 1975 which mentions plaintiffs and the present lawsuit (D.L. Thomas, "War on Pesticides," Barron's, Vol. LV, No. 45, November 10, 1975) (both annexed hereto as Exhibit C).

8. As public figures, plaintiffs have the burden in this defamation action of submitting clear and convincing proof

that the August 14, 1972 Times article was published with actual malice sufficient to defeat a motion for summary judgment. This they have failed to do.

9. In light of the facts set forth herein and the arguments included in the accompanying memorandum of law, it is submitted that defendant's article related to public figures, as constitutionally defined in cases such as Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967). Since, as demonstrated in the accompanying memorandum of law, plaintiffs have failed to raise a disputed genuine issue as to actual malice, summary judgment is mandated both by traditional summary judgment considerations and on First Amendment grounds.

WHEREFORE, it is respectfully submitted that defendant The Times' motion for summary judgment should be granted and the second count of the complaint herein dismissed.

FLOYD ABRAMS

Sworn to before me this
5th day of December, 1975

Notary Public

N.Y. Times
8/14/77 p.33

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

59a

By JOHN DEVLIN

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hys-

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"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen'

are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

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"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders."

"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

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AMERICAN BIRDS

incorporating Audubon Field Notes

APRIL 1972, VOLUME 26, NUMBER 2

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Foreword

With the publication of this issue of *American Birds*, the Seventy-second Christmas Bird Count is now history. New records were again set this year, with 963 counts, and 18,798 participants. With 231 species recorded in Canada, and 583 overall, record totals in this category were also chalked up. This year, just for curiosity's sake (since there is no real meaning to the statistic) a grand total of 64,584,702 individual birds was estimated, of which large numbers were waterfowl, Starlings and blackbirds.

We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in *AMERICAN BIRDS*) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders*. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

The devoted reader will find much of topical interest in the pages of CBCs that follow; some of it highlighted

in the summary by our Christmas Count Editor, but much of it necessarily omitted for the sake of brevity. Notable incursions of Snowy Owl, Bohemian Waxwing, and all the "winter finches" were evident, especially of redpolls. It was a good year—if not the best ever—for Gyrfalcons, but Hawk Owls were conspicuously scarce. Southern and southwestern counts listed more late-lingers, especially warblers, than ever, thanks to a wet and warm autumn.

The dearth of coverage from large areas of northern Canada leaves vast gaps in our knowledge; we need observers in such frigid locales as Inuvik, Isachsen, Yellowknife, Churchill, Moosonee, Goose Bay, and other points north. There are, moreover, substantial gaps even in more populated areas. A look at the Index (back cover) will show which states and provinces are now neglected: one good count in the middle of nowhere would be far more informative than a score locked in deadly competition in adjacent and similar habitats, such as found around most metropolitan areas.

With the enormous growth in popularity of the CBC, we are fast reaching the capacity of this publication and its staff to cope. Something, quite soon, has got to give. Perhaps first to go will be counts close to others, but with inadequate coverage. Very little information of value can come from one person covering an area of 47+ square miles in one day. Actually, there should have been imposed long ago a minimum of 10 observers and 5 parties, even if this meant losing some old and faithful participants.

This coming year we will also try to cut the "fat" out of all current counts, including already-published count circle descriptions, irrelevant weather notes, and unnecessary "verification" notes. The new instructions (page 546) will give details. Perhaps contrarily, next year we are going to open, with some trepidation, the publication to CBCs from the West Indies and Central America (Mexico through Panama) reflecting our greater interest in bird study and conservation in these regions. This decision is against the better judgment of our retiring Editor, and is made with the strict proviso that accepted species names only be used. Accepted names are those used by Fischenmann, E., *The species of Middle American birds*, Trans. Linn.

Soc. N.Y., VII, 1955. Friedmann, H., L. Griscom and R. T. Moore, *Distributional Check-list of the Birds of Mexico*. Pac. Coast Avifauna 33., Cooper Ornith. Soc., Berkeley, Cal., 1957, or handbooks generally conforming to these works. The recent Mexican Field Guide by Irby Davis (Texas University Press, 1972) while of considerable merit, may not be used for nomenclature, since it differs radically from all others.

This coming year we would like one added bit of information that may be helpful in explaining winter incursions. Northern and mountain areas will be asked to note the condition of cone and berry crops: poor, fair, good, excellent (see instructions).

We do not believe that it is yet clear to all compilers that the very same count forms they return are used by typesetters to set this issue in type. Because these forms come in to us in hundreds of different personal writing and printing styles—some tiny, some neat, some sloppy, and some almost illegible—because it is a complicated form, with pages to turn, it is considered "difficult" copy, and takes longer (and costs more) than typewritten manuscript. Compilers who do not follow instructions to the letter add to our editing time and our typesetting costs. Faint pencil, blurred felt-tip pens, unacceptable abbreviations (i.e. R-sh, Hawk) out-of-order species all slow the work. But if some of the lengthiest counts come in letter perfect, so can all.

Once again, a note on the participation fee. After annual explanations for years, we still hear the occasional "Why should I have to pay for my day's birding?" The reason is simple. Without the fee, there would be no funds to print the packet of forms each compiler gets, to mail them, to edit the returned counts, to publish the CBC issue, or to mail it. No fee—no Christmas Bird Count. Even with the \$18,798 received in participation fees this year, the Christmas Bird Count still represents a deficit operation for the National Audubon Society, and an actual subsidy to every participant. Some day, perhaps, an end to the fee will be possible; the quickest way would be for every subscriber to bring in a new subscriber!

One final milestone has been reached with this issue. Allan D. Cruickshank, the eternal youth, claims that he has reached the age of 65 and will retire at year's end. This is obviously a preposterous lie, since Allan is still chasing across marshes and mudflats with all the competitive zest he exhibited only yesterday as a 20-year old. Over the years he has contributed by example and exhortation, more than anyone to the mammoth growth of this annual spectacular, and to

say that he will be replaced by a team of regional Count editors is inaccurate in one sense: he cannot be replaced; it will take a team to do his work. He himself will be a member of that team as long as he desires, which should take us well into the next century. Meanwhile, in retirement, we wish him good birding, sharp pencils, and Cocoa on top once more!

Other members of the editorial staff for this issue include our Technical Editor, Chandler S. Robbins, our arbiter of high counts, Burt L. Monroe, Jr., a new compiler of Canadian high counts, Ross Anderson, of Nova Scotia, and our good right hand, whose many services were noted last year, Lois Heilbrun.

—Robert S. Arbib, Jr.



Imm. Bald Eagle, Oradell Reservoir, N.J. Seen on Hackensack-Ridgewood CBC, Dec. 18, 1971. Photo/Stephen E. Munz.

Mr. Luback

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PRESS RELEASE

EXHIBIT C

...from:

J. Gordon Edwards, Ph.D.
Thomas H. Jukes, Ph.D.
Robert White-Stevens, Ph.D.

...for further information, telephone:

Rothwell, Cappello & Berndtson -- Area 202 785-5020
Attorneys for Dr. Edwards, Jukes, and White-Stevens
1225 - 19th St., N. W., Washington, D. C.

FOR IMMEDIATE RELEASE

AUDUBON SOCIETY AND N. Y. TIMES SUED FOR \$12 MILLION.

NEW YORK, N. Y. -- April 18, 1973 -- Whether eminent scientists can falsely and maliciously be called liars, thereby damaging their professional reputations, is the subject of a \$12 million libel law suit filed here today by three distinguished members of the academic community in U. S. District Court in New York City against the New York Times and the National Audubon Society.

Filing the suit are Dr. J. Gordon Edwards, professor of entomology, California State University, San Jose; Dr. Thomas H. Jukes, professor of medical physics at the University of California, Berkely; and Dr. Robert White-Stevens, professor of biology and Chairman, Bureau of Conservation and Environmental Science, Rutgers University.

The scientists charge that they were libeled by the publications of the two defendants which accused them of "lying" about the count of birds in North America and in branding them as 'scientist-spokesmen' who were paid to lie about whether bird life in North America is thriving despite the use of DDT.

Specifically, the scientists charge that the National Audubon Society is the publisher of a magazine American Birds and that in the foreword to the April, 1972 issue of that magazine the following "false, exaggerated and sensational" article was published and extensively circulated throughout the world:

"We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird count totals (and other data in AMERICAN BIRDS) as providing that the bird life in North America is thriving, and that many species are actually increasing despite the wide-spread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

(more)

"With increased local coverage by the press of Christmas Bird Count activities, it is important than (sic) Count spokesmen re-iterate the simple and truthful fact that what we are seeing is the result of not more birds, but more birders. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

The New York Times was also charged with publishing of an article on August 14, 1972 under the caption "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count" which libeled the plaintiff-scientists. The New York Times story was as follows:

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

"ACCUSED MEN NAMED

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize Winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society."

The scientists maintain that as a result of the libelous articles they have been injured, prejudiced and damaged in their good names, personal and professional reputations, and social standings in their communities.

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Copy of complaint attached. Exhibits I, II, III attached.

War on Pesticides

64^a DDT Was Number One on the Casualty List

By DANA L. THOMAS

IN June 1974, 15 helicopters swooped down on the forests of Washington, Oregon and Idaho, spraying DDT over nearly 430,000 acres of Douglas and other fir trees, ravaged by an epidemic of the tussock moth. For two months, 370 men fought to exterminate a parasite that had destroyed 560,000 acres of timberland, indirectly led to two forest fires and inflicted residents of the area with lung trouble, eye inflammation and other ailments caused by the irritating hairs of tussock moth larvae. When the battle was over, officials totted up the cost. One major lumber firm suffered losses of \$4 million and will need years to restore its timberlands. Municipalities, which received revenues for schools and roads from the lumber industry, eventually face a sharp drop in income and may be forced to hike taxes.

The plight of various individuals is even sadder. A case in point is Adria Teske, a local home-owner. According to papers filed in a lawsuit in the U.S. District Court in Oregon: "Nearly all of her 60-100-old Douglas fir trees are dead or dying. During the infestation in 1973, a forest fire (the Rooster Peak fire) near her home, which started in dead and defoliated trees, threatened to destroy her home. In her effort to save her home by carrying buckets of water to fight the fire, she strained her back. Her physician has advised her that as a result of this injury, she will eventually be partially paralyzed."

After Strong Pressure

While applications of DDT finally stopped the tussock epidemic, the operation was highly unusual. DDT had been banned in this country in June 1972, and its use was permitted by the Environmental Protection Agency only after strong pressure from Washington and Oregon state officials, the petitioning of 50,000 citizens, and a suit filed by the Pacific Legal Foundation to compel the EPA to release the DDT. Even so, if some people have their way, DDT may never be used again in such an emergency.

This deadly insect-killer has freed over one billion people around the world from malaria and saved additional millions from epidemics of typhus, yellow fever and sleeping sickness. It also has enabled millions in poverty-ridden countries to escape famine by killing crop-destroying pests. Nonetheless, it not only has been banned by the EPA for use in the U.S. but environmentalists also have brought a suit against the Agency for International Development that could hinder its exports.

DDT has been the target of a bitter attack by such groups who charge that it kills off birds and other wildlife and causes cancer. Meanwhile, DDT is being vigorously defended by agronomists, entomologists and public health officials. Its defenders argue that millions of people have been exposed to DDT in the battle against disease without suffering ill effects. Statistics released by the Audubon Society show that during the years of peak

The total value of DDT to mankind is inestimable, and is comprised of nutritional, economic and social benefits.

—William D. Ruckelshaus
Assistant Attorney General
August 31, 1970



I am persuaded that the long-range risks of continued use of DDT on cotton and most other crops is unacceptable and outweighs any benefits.

—William D. Ruckelshaus
Administrator
Environmental Protection Agency
June 14, 1972

usage of DDT in the U.S., the populations of many species of birds and other wildlife actually increased.

Interestingly, William Ruckelshaus, the EPA administrator who banned DDT against the advice of his own hearing examiners 15 months previously (while serving as Assistant Attorney General), wrote a 70-page brief, extolling the virtues of the pesticide. "The total value of DDT to mankind is inestimable," he declared. (Quoted by Barron's, Ruckelshaus replies that as Assistant Attorney General, he was an advocate for the government. As EPA Administrator he was a maker of policy and therefore he believes the two statements are not inconsistent.)

Despite the current attacks on DDT, after Dr. Paul Muller, a Swiss chemist developed dichloro-diphenyl trichloroethane (DDT), he won the 1948 Nobel Prize for Medical Achievement. Found to be a most effective killer of deadly disease-bearing mosquitoes, DDT was regarded as a "life-saver"—the greatest discovery after antibiotics. And its achievements in the years since bore out these hopes.

DDT was first employed in Italy during World War II, to combat an epidemic of typhus. It saved the lives of American troops as well as those of numerous Italians. By wiping out the disease among the soldiers, DDT, in the opinion of some observers, averted the possible defeat of the Allies on the Italian front and the stalling of the war effort against Hitler.

In its first eight years, DDT reduced India's annual death rate from malaria from 750,000 to 1,500; by 1959

it eradicated the disease in Europe, Singapore, Chile and several Caribbean islands. By 1968, according to the World Health Service, thanks to DDT, yearly malaria fatalities had dropped to one million around the world, compared with four million in the 1930s. Before World War II, malaria was endemic in 26 states of the U.S. But between 1945 and 1952, the U.S. Public Health Service sprayed over six million U.S. homes with DDT and eliminated the disease here.

DDT also dramatically reduced the danger from typhus, which had killed over 200 million people in Europe and Asia. It has brought yellow fever under control in parts of Africa, Central and South America by killing the deadly Aedes Aegypti mosquito. It has reduced the incidence of sleeping sickness by wiping out the tsetse fly, and it has virtually eradicated the Bubonic Plague.

Despite its widespread use, there was no question as to its safety. In 1971, the National Communicable Disease Center of the Department of Health, Education and Welfare declared, "The safety record for the use of DDT is nothing short of phenomenal."

However, in the early 1960s, DDT suddenly became the target of a massive effort by some to brand it as a health hazard. Rachel Carson wrote a book, Silent Spring, which set forth the premise that man shouldn't attempt to control nature with his chemical technology. If left alone, she argued, nature would correct its own abuses. Miss Carson attacked chemical pesticides as the arch offenders in

the attempt to control nature, and she singled out DDT as the main villain.

According to the environmentalist position, DDT was a cancer threat, destroyed birds and other wildlife, and would eventually destroy the world's supply of oxygen. The nation's press took up the attack and carried the message to millions of Americans. An Environmental Defense Fund launched a legal battle which culminated in the banning of DDT.

In the wake of this all-out attack, a group of scientists belatedly has arisen to challenge what they insist are major fallacies in the thesis of Rachel Carson and her followers. They question the notion that man must stop trying to control nature. This, they say, will lead to disaster. Farmers cannot grow crops and raise livestock without destroying insects, weeds and other predators. Doctors cannot fight disease (and expand the life span) without using chemical drugs.

Develop Compost Heap

Declares Walter Ebeling, Professor of Entomology at the University of California: "For those wishing to live in a 'balance of nature,' there are still large areas available such as I have seen in Eastern Peru and the Congo. There they might pass their brief lives, developing compost piles and 'organic' gardens to their heart's content. Incessantly surrounded by swarms of insects, many of them vectors of disease, some venomous, all pestiferous."

Although the defenders of DDT admit that it must be used carefully, the same must be said for medical drugs to cure disease. Points out one scientist: "It is dangerous to drive an auto carelessly. There is a risk in taking an airplane. Does that mean that society should eliminate autos and planes?"

Society, they insist, must weigh the risks of any course of action against the benefits. And, the benefits of DDT, they point out, are substantial. Thanks to chemical pesticides, fertilizers and other tools for scientific farming, the U.S. has been able to boost its food production to the point where it takes only 5% of the population to feed the rest of the nation. This compares with 55% in Russia.

Dr. Norman Borlaug, who won the Nobel Prize in 1970 for developing high-yield food grains, says he couldn't have accomplished this without chemical fertilizers and pesticides like DDT. Pointing out that half of the people in the world are undernourished, Dr. Borlaug warned, before DDT was banned, that if it were outlawed, "I have wasted my life's work."

Other scientists have been spearheading the fight to place the scientific record before the American people. Prominent among them are Dr. J. Gordon Edwards, Professor of Entomology at San Jose (Calif.) State College; Dr. Thomas Jukes, Professor of Medical Physics, University of California, Berkeley; and Dr. Robert White-Stevens, chairman of the Bureau of Conservation and Environmental Science, Rutgers University.

Continued on Page 14

WAR ON PESTICIDES

Continued from Page 5

The struggle has become more and more heated. Dr. Edwards told Barron's that he, Dr. Jukes and Dr. White-Stevens last spring filed a \$12 million libel suit against the Audubon Society for writing that they had been paid by the pesticides industry to lie about the Audubon bird counts (which the Edwards groups maintains show the bird population is rising).

In banning DDT for farm uses, the then-EPA director Ruckelshaus over-ruled the federal hearings examiner Edmund Sweeney. After seven months of hearings, during which 125 witnesses were called and 9,000 pages of testimony were submitted, Sweeney declared that the evidence indicated that DDT wasn't a cancer hazard. He added that, on balance, its usage did not create an unreasonable risk with its benefits.

New Assignment

"In my opinion," he said, "the evidence in this proceeding supports the conclusion that there is a present need for the essential uses of DDT."

After leaving the EPA in 1973 and going into private law practice, Ruckelshaus shifted his stance. Last spring, he was hired as a legal representative of the polyvinyl chloride (PVC) industry, several of whose workers had died of cancer after long exposure to vinyl chloride gas (Barron's, December 9, 1974).

The EPA, reacting to the

pressure of environmentalist groups, has demanded stringent plant regulations for PVC exposure. The industry argues that they are more excessive than necessary to protect its workers.

In his new role, Ruckelshaus is displaying a more pragmatic approach to the issues of the environment. He is now asking ecologists to view the environment in the context of other social problems. If Ruckelshaus is right in his attitude today, his approach to the DDT problem should be re-examined.

The aforementioned DDT spraying in the Northwest—like everything else about the pesticide—is the subject of bitter controversy. Environmentalists claim that the tussock moth epidemic was dying off after the third year and that the spraying was unnecessary. But the U.S. Forest Service points out that seven major outbreaks of the tussock moth have lasted four or more years and that if DDT hadn't been used, there is no telling what further damage would have been inflicted.

No Documented Cases

The Forest Service's monitoring studies indicate that no documented cases of fatal DDT poisoning occurred in man or any other adverse effect to people connected with the 1974 spraying operation. Nor was there any appreciable bird loss directly attributable to DDT, although several birds were found dead of a variety of causes. While the

spraying had a short-term effect on aquatic and terrestrial insects, there was no specific mortality found in fish. Sheep and cattle, grazing on ranges involved in the spraying, were held back from the market longer than usual to make sure the level of DDT residues dropped below the tolerance for marketed meat set by the government.

While DDT defenders have scored a temporary victory by forcing its release to fight the tussock moth, it remains under a tight ban for all other agricultural uses. Farmers have been told that DDT is not needed because there are excellent substitutes available. When the EPA banned DDT, it accepted methyl parathion as the best substitute for most crops. Actually, parathion is highly dangerous and has killed both children and adults.

Although no other chemical has been the subject of such intensive research as DDT, no conclusive evidence has been found that it causes cancer in humans. In 1967, Dr. Edward Laws, of the U.S. Public Health Service, launched a study of workers at Montrose Chemical Co., the world's largest producer of

DDT and the only firm making it in the U.S. Thirty-five workers who had been heavily exposed to DDT from nine to 19 years, absorbing over 400 times as much as the general public, were examined. In addition, the records of the other former employees who had worked at the plant at various times during the previous 19 years were studied. No cases of cancer were reported.

Massive Doses

Another study was undertaken by Dr. Wayland Hayes, formerly of the U.S. Public Health Service. He examined 47 prisoners who volunteered to take, for 21 months, doses of DDT 1,000 times greater than the average American absorbed during a period of extensive DDT usage from 1956 to 1972. No cancer developed. Dr. Hayes reports, nor did any other illness show up that did not have an easily recognized cause unrelated to DDT.

On the other hand, DDT has been used successfully to treat unconjugated jaundice (as well as adrenal cancer). Dr. Laws undertook an experiment with mice at Johns Hopkins to determine whether DDT might also be used to retard the growth of brain tumors. He induced tumors in a control and an experimental group of mice and then fed the latter DDT. This group, according to Dr. Laws, generally developed tumors more slowly than the control group. He concluded that the test provides an indication that DDT may have an inhibitory effect on at least one experimental cancer.

A major charge of the environmentalists—that DDT spraying kills birds and other wildlife—has been hammered home to the American people via newspapers, magazines and television. An examination of the evidence raises the question as to whether many gentlemen of the media read anything but publicity handouts.

Bird Population Rises

Dr. Gordon Edwards, Thomas Jukes and other scientists, fighting to expose the allegation of a declining bird population, cite the figures put out by the National Audubon Society. They show that far from declining during the years of DDT usage, the bird population actually has been on the rise. Every Christmas, bird watchers all over America assemble to count birds and turn in their figures to the Audubon Society.

According to this data, from 1941 through 1969, the number of robins observed increased 12 times; cowbirds, 21-fold; blackbirds, 38-fold; and grackles, 131 times. Indeed, gulls became so numerous on the East Coast that in 1972 the Massachusetts Audubon

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Customers?

Continued from Page 12

Lynch's spacious office occupies half the ground floor of a two-story building. Our guided tour was conducted by Richard M. Brandt, assistant vice president and an avid tennis buff. As green numbers flowed past in an endless stream on two large electronic tickers, we couldn't help noticing that the entire sales force wore suits and ties in the heat of battle. "It's not company policy," Brandt explained. "We just prefer to project a conservative image here."

Less than a mile away on the south side of the expressway, Hutton occupies cozy space on the ground floor of a six-story tower. Sporting a bushy black moustache and no jacket, Clarence G. Catallo, branch manager, greeted us. His hobby is racing expensive Porsches. Under orders not to discuss the lawsuit, he invited us to look around. Virtually everyone wore sports clothes, and few neckties were in evidence. Salesmen were talking on the phone, and people were listening.

Pesticides

Continued from Page 14

Bee Society sought permission to poison thousands in order to protect the terms along the coast.

In Silver Spring, Rachel Carson lamented the decline of robins and predicted that they were a doomed species because of DDT. But according to the Audubon bird count, from 1949, the year after DDT was introduced into the U.S., through 1962, the number of robins observed shot up from 41,214 to 528,303. The tally of other kinds of birds show comparable gains.

(Queried about these figures, an Audubon spokesman said that more people are out counting birds than ever before and hence are turning in greater numbers. Asked if he knows of statistics to refute the signs of a rising trend in many species he admitted he knew of none, but insisted several species like Bald Eagles were declining.)

Confirms Audubon Figures

Confirming the Audubon figures are statistics released by the Hawk Mountain Sanctuary in Pennsylvania, which has been counting birds since the 1930s. They reveal an increase in most kinds of migrating hawks during the peak years of DDT usage. Osprey sightings climbed from less than 200 in 1945 to over 600 by 1970 (even while anti-DDT groups were claiming that ospreys, like robins, were a vanishing species). The total of migratory birds rose from 15,471 in 1941 to 29,765 in 1968. While the number of bald eagles has been declining, the drop began 15 years before the introduction of DDT.

Nor has other wildlife been significantly affected by the use of DDT. According to the U.S. Department of the Interior, the population of big game doubled between 1948 and 1967. White-tailed deer, for example, increased from 461,500 to 1,361,999; antelope, from 22,600 to 54,925; elk, from 42,000 to 81,368; and black bear, from 13,900 to 21,019.

Another charge of the environmentalists is that close to 25% of all the DDT manufactured has collected in the world's oceans, where it is killing baby fish and destroying plankton, and threatens to destroy man's oxygen. In 1971, the National Academy of Sciences published this charge by one of its panels, which has received wide publicity. After criticism from skeptical scientists, the NAS two years later appointed a new committee to check on the findings of the original one. In January 1973, it reported to NAS that "less than 1% of the DDT that has been

produced appears now to be in the surface of the oceans. This is contrary to the frequent interpretation of the 1971 report." To date, however, the NAS has not publicized this committee's findings.

The EPA itself has confessed the facts regarding DDT. In a report on the human dietary intake of DDT, the EPA said it was 13.8 milligrams a day in 1970. Upon being challenged, Laurence O'Neill of the Office of Pub-

lic Affairs, admitted in a letter to Max Sobelman of Montrose Chemical: "I have checked with Dr. Arnold Aspelin of EPA's Pesticide Program and you are correct in stating that EPA's DDT report erred. . . . According to Dr. Aspelin the correct figures would have been 15 micrograms per day in 1970." In other words, the actual amount was only one-thousandth of the level previously reported. The government has

tested the facts about other pesticides with exaggeration. Last spring, it came out with a report—which received wide press coverage—that hundreds of thousands of American farm workers are injured annually by pesticides. A week later, it was admitted that the figures were undocumented. A spokesman explained: "We used those statistics in good faith, thinking they were accurate. They turned out not to be accurate."

The battle over DDT is only part of a bigger issue. Since some mosquitoes are growing resistant to DDT, many entomologists cite the need to encourage research to develop and refine a spectrum of safe pesticides which, carefully used, will battle the deadly parasites and insects that beset mankind. Within the past five years, virtually every known parasitic disease

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Pesticides

Continued from Page 19

has been found in the U.S. The American Journal of Tropical Medicine says that epidemics lurk continually as a threat. In fact, last summer, America's worst outbreak of encephalitis in two decades broke out in 15 states. The disease is caused by a mosquito which carries it from birds to human beings.

Nonetheless, environmentalist groups have launched a nationwide campaign in the press, the halls of Congress and at the EPA to outlaw not only DDT but also a growing spectrum of chemicals used to control crop pests, as well as diseases. Now farmers, a number of scientists and rank-and-file citizens are beginning to fight back. The story of this concentration will be detailed in a forthcoming issue.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

73 Civ. 1927

In Charge (CMM)

NOTICE OF MOTION
:FOR SUMMARY JUDGMENT

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Diary	EST
In Charge	(CMM)

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert S. Arbib, Jr., the annexed statement under General Rule 9(g), and upon the papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Charles M. Metzner in Room 2201 in the United States District Courthouse, Foley Square, New York, New York, on December 15, 1975, at 10:00 o'clock in the forenoon of that day, or as soon as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint as against defendants, National Audubon Society, Inc., Robert S. Arbib, Jr., Roland C. Clement and Elvis J. Stahr, Jr., upon the ground that there is no genuine issue as to any material fact and that said defendants are entitled to judgment as a matter of law:

PLEASE TAKE FURTHER NOTICE, that pursuant to General Rule 9(c)(2), opposing affidavits, the response of plaintiffs to the annexed statement under

68a

General Rule 9(g) and answering memoranda must be served
at least three days before the return date.

Yours, etc.

Dated: New York, New York
December 5, 1975

GIFFORD, WOODY CARTER & HAYS and
CROWE, McCOY, AGOGLIA, CONGDON & ZWEIBEL

By Charles F. Thaw
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J. GORDON EDWARDS, Ph.D.,	:	
THOMAS M. JUKES, Ph.D.,	:	
ROBERT H. WHITE-STEVENS, Ph.D.,	:	
	:	
Plaintiffs,	:	
	:	73 Civ. 1927 (CMM)
-against-	:	
	:	STATEMENT PURSUANT
NATIONAL AUDUBON SOCIETY, INC.,	:	<u>TO GENERAL RULE 9(g)</u>
THE NEW YORK TIMES COMPANY, INC.,	:	
ROBERT S. ARBIB, JR.,	:	
ROLAND C. CLEMENT,	:	
ELVIS J. STAHR, JR.,	:	
	:	
Defendants.	:	

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The material facts as to which defendants, National Audubon Society, Inc., Roland C. Clement, Robert S. Arbib, Jr., and Elvis J. Stahr, Jr. contend there is no genuine issue to be tried are as follows:

1. This is an action by plaintiffs, J. Gordon Edwards, Thomas M. Jukes and Robert H. White-Stevens, seeking compensatory and punitive damages arising out of three allegedly libelous publications.

2. Plaintiff, J. Gordon Edwards, Ph.D., a professor at San Jose University, California, has been and is a resident of the State of California, is engaged in academic pursuits and scientific research in the fields of entomology and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effect of DDT and related pesticides upon the environment.

3. Plaintiff, Thomas M. Jukes, Ph.D., has been and is a resident of the State of California and is engaged in academic pursuits and scientific research in the fields of medical physics and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effects of DDT and related pesticides upon the environment. He refers to himself as "a (n) world authority on the nutritional requirements of birds". He is presently a professor of medical physics at the University of California in Berkeley and is a lecturer on nutritional science at the University of California.

4. Plaintiff, Robert H. White-Stevens, Ph.D., has been and is a resident of the State of New Jersey, and is engaged in academic pursuits and scientific research in the fields of plant physiology and conservation, and has frequently given lectures, written papers and letters for publication, and has participated in debates dealing with scientific and other questions pertaining to the effect of DDT and related pesticides upon the environment. He is a professor of biology at Rutgers University, New Brunswick, New Jersey.

5. Defendant National Audubon Society, Inc., is engaged in educational, scientific, investigative and charitable pursuits fostering recognition of the need for and furthering the preservation of wildlife and other natural resources. It is actively involved in public education in all aspects of protection of the environment, and is the publisher of the magazine "American Birds", in collaboration with the United States Fish & Wildlife Service.

6. Defendant, Robert S. Arbib, Jr., at all material times is and has been an employee of the defendant, National Audubon Society, Inc., and the editor of the magazine "American Birds".

7. Defendant, Roland C. Clement, is and at all material times has been a vice president of defendant, National Audubon Society, Inc., and at all material times was a staff biologist of that defendant.

8. Defendant, Elvis J. Stahr, Jr., is and at all material times has been the president of defendant, National Audubon Society, Inc.

9. Defendant, The New York Times Company, Inc., is and at all material times has been a corporation engaged, among other things, in the business of publishing the newspaper, The New York Times, and at all said times employed Mr. John Devlin, as a reporter.

10. For at least 25 years, there has raged a heated public controversy between proponents and opponents of the widespread use of the insecticide DDT and other pesticides. This controversy is a matter of paramount public interest and concern.

11. Plaintiffs and defendant Audubon have voluntarily participated in this public controversy, and have repeatedly expressed their views publicly.

12. Annually since 1900, defendant Audubon and its members have conducted a "Christmas Bird Count", in which observers venture into the field to count the number of birds of various species which they see during the count period. The results have been published annually in the magazine "American Birds" and its predecessor "Audubon Field Notes".

13. Plaintiffs and defendant Audubon have publicly disagreed over what are and what are not scientifically justifiable interpretations of Audubon's annual Christmas Bird Count data.

14. Plaintiffs' thesis, often expressed publicly in the context of the larger public controversy over DDT, has been that Audubon's Christmas Count data shows that birds have increased in numbers despite the use of DDT and other pesticides. Defendant Audubon has publicly disagreed that plaintiffs' thesis is a scientifically justifiable use of Audubon's Christmas Bird Count data.

15. In the Foreword to the April, 1972, issue of its magazine "American Birds", Vol. 26, No. 2 p. 135 (Complaint, Exhibit I), defendant Audubon published, inter alia, the following material, portions of which are referred to in paragraph 9 of plaintiffs' complaint:

"We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite, obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt-and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of every-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen re-iterate the simple and truthful fact that what we are seeing is result of not more birds, but more birders. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

16. None of the plaintiffs were named or otherwise specifically identified in the aforesaid April, 1972, edition of "American Birds".

17. In the August 14, 1972, edition of The New York Times, there appeared under the by-line of John Devlin an article captioned "Pesticide Spokesman Accused of 'Lying' on Higher Bird Count" (Complaint, Exhibit II) containing, inter alia, the following language, portions of which plaintiffs cite in paragraph 10 of their complaint:

"Segments of the pesticide industry and certain 'scientist-spokesmen' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the forward by Robert S. Arbib, Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days, but simply 'more birders' who go out on the annual counts and thus increase the size of the totals reported:

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California, Norman E. Borlaug, Nobel Prize winner, Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who is now a private consultant and a member of the National Audubon Society."

18. The above-quoted caption to The New York Times article of August 14, 1972, was not written by New York Times reporter John Devlin. The body of the article was written by Mr. Devlin after he had had telephone conversations with defendant Arbib and with plaintiffs White-Stevens and Jukes.

19. Mr. Devlin communicated with no person at Audubon other than Mr. Arbib in connection with the portion of the article Mr. Devlin wrote, and Mr. Arbib made no statement to Mr. Devlin in the course of their telephone conversations which did anything more than identify the named individuals as among the persons described in the aforesaid Foreword to "American Birds".

20. On August 14, 1972, the following letter (Complaint, Exhibit III) of which plaintiffs complain in paragraph 11 of their complaint was sent to the editor, New York Times:

"August 14, 1972

Editor
New York Times
229 West 43d Street
New York, New York

Dear Sir:

Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have 'better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.'

This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

Nor do we like to call people liars, but those who have most consistently misused our data--Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemical Association, and more recently Nobel laureate Norman E. Borlaug--recently have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Sincerely, .

(signed for Arbib by RCC after telephone consultation; Arbib in N.Dak. at AOU)
Robert S. Arbib, Jr."

21. This letter, which was not printed by The New York Times, was written by defendant Clement.

22. It is in the context of the public controversy over DDT and the ancillary public controversy over the significance of Audubon's Christmas Bird Count data thereto that the above allegedly defamatory statements of which plaintiffs complain, were made.

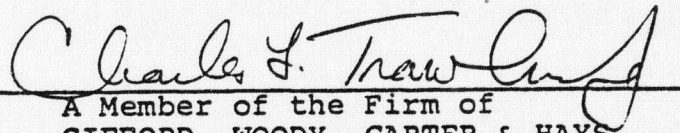
23. Each of the plaintiffs is, and must be viewed in the context of this action, as a public figure.

24. None of the utterances of defendants, National Audubon Society, Inc., Robert S. Arbib, Jr., Roland C. Clement and Elvis J. Stahr, Jr., of which plaintiffs complain, were known by said defendants to be false or were published by said defendants with reckless disregard of their truth or falsity.

Dated: New York, New York
December 5, 1975

GIFFORD, WOODY, CARTER & HAYS and
CROWE, MCCOY, AGOGLIA, CONGDON & ZWEIBEL

By



A Member of the Firm of
GIFFORD, WOODY, CARTER & HAYS
Attorneys for Defendants,
National Audubon Society, Inc.
Robert S. Arbib, Jr., Roland C.
Clement and Elvis J. Stahr, Jr.
14 Wall Street
New York, New York 10004
212 (349-7400)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

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AFFIDAVIT

----- x
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT S. ARBIB, JR., being duly sworn, deposes and says:

1. I am employed by the National Audubon Society, Inc., as Editor of the magazine "American Birds", and have held that position since December 1, 1970.

2. I wrote the Foreword to the April, 1972, issue of "American Birds". The substance of the Foreword was suggested to me in general terms by Roland C. Clement, Staff Biologist and Vice President of the National Audubon Society, Inc.

3. At the time the Foreword was written and published, I was aware of the existence of only one of the plaintiffs -- Mr. Jukes -- from having read a letter of his in The New York Times, and had met none of the plaintiffs.

4. At the time the Foreword was written and published, I did not in my mind associate the names of

any specific individuals to which the Foreword makes reference, as misconstruing our Bird Count data.

5. Some time following publication of the April, 1972, issue of "American Birds" I received three separate telephone requests from Mr. John Devlin of The New York Times for information regarding the issues raised in the Foreword. After the second such request I spoke with Mr. Clement, who gave me a copy of the manuscript of an article he had written (Exhibit 1 to Audubon's answers to interrogatories) from which I extracted six names, including plaintiffs', as persons who had misinterpreted the Audubon Society's Bird Count data in support of pesticides. At no time in my conversation with Mr. Clement did he use the word "liar" or any similar term in referring to these men. On receiving Mr. Devlin's third telephone call, I named the six men.

6. On August 14, 1972, during a coffee break at a conference in Grand Forks, North Dakota, which I was attending, I received a telephone call from Mr. Clement. Mr. Clement informed me that he had sent over my signature the letter to the Editor, New York Times, which the plaintiffs have reproduced in Exhibit III of their complaint.

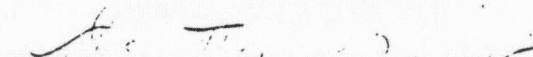
7. I know of no falsity or inaccuracy, nor at any time have I had any knowledge of falsity or inaccuracy in the language of the Foreword, in my statements to Mr. Devlin, or in the August 14, 1972, letter written by Mr. Clement to the Editor of The New York Times. At the time the Foreword was written and published, at the time I spoke with Mr. Devlin, and at the time Mr. Clement informed me he had sent the letter to the Editor, I had no

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reason to believe that anything in the Foreword, in my statements to Mr. Devlin, or in the letter, was inaccurate or false. I, therefore, had no doubts as to the truth of that language, those statements, or that letter.


Robert S. Arbib, Jr.

Sworn to before me this
5th day of December, 1975.


Notary Public

GENE MARIE SINCLAIR
NOTARY PUBLIC, State of New York
No. 31-978025
Qualified in New York County
Commission Expires March 30, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed		
Signed		
Received		
Docket	12/1/72	51
Diary	12/1/72	
In Charge	12/1/72	11

J. GORDON EDWARDS, Ph.D.
THOMAS H. JUKES, Ph.D.
ROBERT H. WHITE-STEVENSON, Ph.D.

73 Civ. 1927
(CMM)

Plaintiffs

v.

PLAINTIFFS' STATEMENT OF
MATERIAL FACTS AS TO WHICH
THERE EXISTS A GENUINE
ISSUE TO BE TRIED

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.
ROBERT S. ARBIB, JR.
ROLAND C. CLEMENT
ELVIS J. STAHR, JR.

Defendants

Plaintiffs submit the following Statement pursuant to the second paragraph of Rule 9(g) of the General Rules of this Court.

1. That the New York Times was motivated by actual malice in the publication of the August 14, 1972 article concerning plaintiffs and others for the following reasons and on the following grounds:

- a) Plaintiffs are not liars.
- b) The New York Times article upgraded and aggravated the statements appearing in the "American Birds" forward.
- c) The Times article was not a fair and accurate report of information furnished by Audubon.
- d) The New York Times was repeatedly told, prior to publication, that the statements that they were planning to publish were false and libelous.

e) The New York Times had an unusual opportunity to investigate the truth of the matters asserted.

f) The New York Times did so investigate, and material pertinent to the issue was made available to the Times prior to the August 14, 1972 publication.

g) The Times was specifically warned at least twice of the defamation potential inherent in the proposed publication.

h) The Times published the August 14, 1972 article with wanton and reckless disregard of the rights of plaintiffs.

i) The Times did not publish Dr. Jukes letter to the Editor dated August 15, 1972 which protested the publication of the Times article.

2. That defendants Audubon, Clements, Arbib and Stahr were motivated by actual malice in reference to the publication of the Foreword to "American Birds" of April, 1972; in reference to the conversations and transmission of information as between Clement and Arbib, and in reference to transmission of information as between Arbib and Devlin of the New York Times.

a) Audubon has advertised that it is not afraid to point the finger at individuals.

b) That prior to the publication of any of the defamatory material at issue in this matter, Clement participated in the discussions of the development of means and methods to silence at least two of the three plaintiffs in this action.

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c) Clement has on a prior occasion threatened to defame Yannacone in the newspapers, starting with the New York Times.

d) That Devlin was the willing ally of Audubon for the purposes of receiving and submitting to the New York Times material that Audubon wished to be published.

e) That in making the names of plaintiffs and others available to Devlin, Audubon knew and understood that Devlin would publish such names in a defamatory context.

3. That Audubon confirmed and adopted the terms and characterization of plaintiffs appearing in the New York Times by the letter from Clement to the New York Times, dated August 14, 1972, Exhibit 3 annexed to the Complaint.

4. Plaintiffs are not public figures for the purposes of this litigation.

a) This litigation involves the Audubon Christmas Bird Counts and plaintiffs' statements in respect thereto. This includes the issue of whether such statements, not yet in issue, were truthful, or whether plaintiffs reasonably believed such statements to be truthful.

b) The Audubon Christmas Bird Count is not a public controversy for the purposes of attaching "public figure" status to plaintiffs.

c) Neither Devlin nor Arbib knew about or had ever heard of plaintiffs at the time of the publication of the defamatory material about plaintiffs. Arbib was vaguely familiar with one of

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the plaintiffs as having written a letter to the Editors of the New York Times that had been published.

5. Plaintiffs' First Amendment privileges are at issue in this litigation. Plaintiffs should not be deprived of their civil rights concerning the protection of their reputations and integrity as a consequence of their debating issues involving matters of public import, wherein they take a position contrary to that of the government, and criticize the official actions of the government.

Dated: December 18, 1975
Washington, D. C.

Yours, etc.

Thomas A. Rothwell
Rothwell, Cappello & Berndtson
Attorneys for Plaintiffs
1225 - 19th Street, N. W.
Washington, D. C. 20036
(202) 785-5025

Randolph J. Seifert
Attorney for Plaintiffs
11 East 44th Street
New York, New York 10017
MU 2-3663

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84a

J. GORDON EDWARDS, Ph.D.
THOMAS H. JUKES, Ph.D.
ROBERT H. WHITE-STEVENS, Ph.D.

Plaintiffs

v.

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.
ROBERT S. ARBIB, JR.
ROLAND C. CLEMENT
ELVIS J. STAHR, JR.

Defendants

73 Civ. 1927
(CMM)

PLAINTIFFS' RESPONSE TO
DEFENDANTS' RULE 9(g)
STATEMENTS

This responsive statement is submitted on behalf of plaintiffs and responsive to defendants' Rule 9(g) statements, pursuant to the third paragraph of Rule 9(g) of the General Rules of this Court.

As to The New York Times:

Statement No. 1. Plaintiffs accept this statement.

Statement No. 2. Plaintiffs accept this statement.

Statement No. 3. Plaintiffs accept this statement.

Statement No. 4. Plaintiffs accept this statement and supplements it by noting that two other individuals were named in the August 14, 1972 article, namely Dr. Spencer and Dr. Borlaug.

Statement No. 5. Plaintiffs do not accept this statement.

The controversy relating to the environmental effects of the use of DDT and other pesticides dates from the early and mid-60's. It is generally associated with the 1962 publication of SILENT SPRING.

Statement No. 6. Plaintiffs accept this statement and supplement it by noting that the Times has also participated in the DDT controversy, and has repeatedly expressed its views in its newspaper.

Statement No. 7. There is no evidence as yet in this record as to when and where and how the plaintiffs and Audubon have "publicly disagreed" in reference to the Audubon Christmas Bird Count data. Accordingly, plaintiffs do not agree with this statement.

Statement No. 8. Plaintiffs disagree with this statement. The controversy in issue here relates to Audubon Christmas Bird Count, and the fact that plaintiffs have been characterized by defendants as liars in reference to plaintiffs' reference to the use of such bird count data. The public controversy relating to pesticides is an ancillary and peripheral matter as to this litigation. Audubon Christmas Bird Count data is not a "related public controversy."

Statement No. 9. Plaintiffs disagree with this characterization of plaintiffs as public figures. The context of the action is the Audubon Christmas Bird Count data. This is not a public controversy. Therefore, plaintiffs are not public figures for the purposes of this action.

Statement No. 10. Plaintiffs accept this statement and supplement same by noting that two additional names were furnished by Arbib, being the names of Dr. Borlaug and Dr. Spencer.

Statement No. 11. Plaintiffs disagree with this statement. On pages 71 through 77 of the Arbib deposition and again commencing on page 80 and 81, Arbib testified as to his conversations with Devlin. Among other things, Mr. Arbib said in reference to his conversation with Devlin, "I particularly stressed the fact to Mr. Devlin that in no way did we want to associate those names that I was to give him with any such phrases as paid liars..." In other respects, the New York Times Statement No. 11 is inconsistent with the evidence of record.

Statement No. 12. Plaintiffs disagree with the conclusions contained in the following grounds:

- a) Plaintiffs are not liars, and the Times knew that plaintiffs were not liars.
- b) The New York Times article upgraded and aggravated the statements appearing in the "American Birds" Foreward.
- c) The Times article was not a fair and accurate report of information furnished by Audubon.
- d) The New York Times was told prior to publication that the statements that they were planning to publish were false and libelous.
- e) The New York Times had an unusual opportunity to investigate the truth of the matters asserted.
- f) The New York Times did investigate, and material pertinent to the issue was made available to the Times prior to the August 14, 1972 publication.

g) The Times was specifically warned of the defamation potential inherent in the proposed publication.

h) The Times published with wanton and reckless disregard of the rights of the plaintiffs.

i) The Times did not publish Dr. Jukes letter to the Editor, dated August 15 that protested the publication of the article.

As to defendants Audubon, Arbib, Clement and Stahr:

Statement No. 1. Plaintiffs accept this statement.

Statement No. 2. Plaintiffs accept this statement.

Statement No. 3. Plaintiffs accept this statement and supplement it by adding that Dr. Jukes is the discoverer of two vitamins essential to bird life.

Statement No. 4. Plaintiffs accept this statement and supplement it by adding that Dr. White-Stevens is Chairman of the Bureau of Conservation and Environmental Science, Rutgers University.

Statement No. 5. Plaintiffs accept this statement.

Statement No. 6. Plaintiffs accept this statement.

Statement No. 7. Plaintiffs accept this statement and supplement it by adding that Mr. Clement is the Staff Biologist of that defendant.

Statement No. 8. Plaintiffs accept this statement.

Statement No. 9. Plaintiffs accept this statement.

Statement No. 10. Plaintiffs do not accept this statement.

The controversy relating to the environmental effects of DDT and

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other pesticides dates from the early and mid-60's. It is generally associated with the 1962 publication of SILENT SPRING.

Statement No. 11. Plaintiffs accept this statement.

Statement No. 12. Plaintiffs accept this statement.

Statement No. 13. Plaintiffs do not accept this statement.

There is no evidence as yet in this record as to when and where and how the plaintiffs and Audubon have "publicly disagreed" in reference to the Audubon Christmas Bird Count data.

Statement No. 14. Plaintiff does not accept this statement.

There is little if any evidence in the record of the "public controversy over DDT." See plaintiffs' Statement of Genuine Issues to be tried in this action.

Statement No. 15. Plaintiffs accept this statement.

Statement No. 16. Plaintiffs accept this statement.

Statement No. 17. The plaintiffs accept this statement but decline to exclude the remainder of the article, which should be quoted in full. See Exhibit 11 annexed to the Complaint.

Statement No. 18. Plaintiffs accept this statement on the basis of the evidence presently of record, and supplement it with the fact that Mr. Devlin also had a telephone conversation with Dr. Spencer, who warned Devlin that the Audubon Foreword was "almost libelous."

Statement No. 19. Plaintiffs do not accept this statement. On pages 71 through 77 of the Arbib deposition and again on pages 80 and 81, Arbib testified as to his conversations with

Devlin. Among other things, Mr. Arbib said in reference to his conversation with Devlin, "I particularly stressed the fact to Mr. Devlin that we did not want to associate these names with any such phrases as paid liars..." In other respects the Audubon Statement No. 19 is inconsistent with the evidence of record.

Statement No. 20. Plaintiffs accept this statement but would supplement it by adding that it was written on Audubon stationery.

Statement No. 21. Plaintiffs accept this statement.

Statement No. 22. Plaintiffs disagree with this statement. The controversy in issue here relates to the Audubon Christmas Bird Count and the fact that plaintiffs have been characterized by defendants as liars in reference to plaintiffs' use of such bird count data. The public controversy relating to the use of pesticides is an ancillary and peripheral matter as to this litigation. Audubon Christmas Bird Count data is not a "related public controversy."

Statement No. 23. Plaintiffs do not accept this statement. They do not agree with the characterization of plaintiffs as public figures. The context of the action is the Audubon Christmas Bird Count data. This is not a public controversy. Therefore, the plaintiffs are not public figures for the purposes of this action.

Statement No. 24. Plaintiffs do not accept this statement. The totality of evidence in the record tends to prove the contrary.

Dated: Washington, D. C.
December 18, 1975

Yours, etc.

Thomas A. Rothwell
Rothwell, Cappello & Berndtson
Attorneys for Plaintiffs
1225 - 19th Street, N. W.
Washington, D. C. 20036
(202) 785-5025

OPINION

90a

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
et al.,

Defendants.

MEYER, D. J.,

Defendants move for summary judgment in this defamation action based upon an article in "American Birds," a subsequent report on that article in the New York Times on August 14, 1972, and a letter from one defendant to the New York Times dated August 14, 1972.

The April, 1972 issue of "American Birds," a quarterly publication of the National Audubon Society, reported the results of the annual Audubon Christmas Bird Count. In the foreword of that issue its editor, defendant Robert Arbib, wrote that "certain paid

S. DISTRICT COURT		FILED	
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'scientist-spokesmen' of the pesticide industry were citing the Christmas Bird Count totals to prove that North American bird life was thriving despite the use of DDT. He called this conclusion "false and misleading," stating that the higher counts were the result of more and better bird counters and not more birds. Arbib further stated that "[a]ny time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." The April, 1972 issue of "American Birds" was not mailed out until July.

On August 14, 1972, the New York Times carried an article about the foreword to "American Birds" bearing the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." The New York Times named five scientists who had been cited by Arbib in an interview with John Devlin, the New York Times reporter. Three of these scientists are the plaintiffs in this action.

On August 24, 1972, defendant Roland Clement sent a letter over the signature of defendant Arbib to the New York Times. This letter referred to "Jack Devlin's pious piece." Clement wrote "[a]nd do we like to call

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people liars, but" those who have misused the Audubon data have had the opportunity to learn of their misinterpretations from the Society's explanations. The five scientists were named in this letter. The New York Times did not print the letter.

Defendants contend that plaintiffs are public figures in the context of this action because of their reputations in the scientific community and their public stands on the controversy surrounding the use of DDT. As public figures under the standard laid down in New York Times v. Sullivan, 376 U.S. 254 (1964) and in Curtis Publishing Company v. Butte, 388 U.S. 130 (1967), plaintiffs must prove actual malice on the part of defendants in order to succeed in this action.

Plaintiffs deny that they are public figures, contending that the controversy surrounds the use of the Audubon Christmas Bird Count data, not a matter of general public interest.

The controversy surrounding the use of DDT is of interest to the public. Plaintiffs are prominent scientists who have written and lectured on various subjects, including the use of pesticides. They are

public figures in the context of this action. Quiter v. Westinghouse Electric Corporation, 326 F. Supp. 1042 (S.D.N.Y. 1973); Aday v. United Action for Animals, Inc., 361 F. Supp. 457 (S.D.N.Y. 1973), aff'd mem., 493 F.2d 1397 (2d Cir.), cert. denied, 419 U.S. 842 (1974).

The burden is on the movants to show the absence of any genuine issue as to whether they acted with actual malice when they made the statements. A statement is made with actual malice if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, supra at 280

The Court has reviewed the depositions of the parties and of prospective witnesses which plaintiffs have submitted in opposition to this motion. Defendant Arbib testified that he wrote the article in "American Birds" with no specific individuals in mind, upon a suggestion by defendant Clement or another that the magazine say something about misuse of the Christmas Bird Count data. He testified that John Devlin pressured him for the names of the scientists to whom he was referring for use in the New York Times report on the article. Upon consultation with Clement, Arbib gave Devlin the names of five scientists

cited by Clement. Both Arbib and Clement testified that they supplied the names of the scientists as misusers of data and not as liars. Arbib said that he told Devlin that he did not want the men to be called liars.

Devlin testified that Arbib said that it would be better not to use names, but that the five scientists he did name were the persons to whom the article referred. Devlin denied that Arbib said that these men were not to be called liars. In addition, there is the August 14, 1972 letter to the New York Times written by Clement, over the signature of Arbib, from which a jury might infer approval of the New York Times article.

Devlin testified that he called some of the scientists before publication. Their testimony is that they protested the charge as untrue and sent letters and information about the DDT controversy to Devlin. One labeled the charge as libelous. Whether there was adequate investigation of a story that was not "hot news" is a question of fact for a jury. A finding that the investigation was inadequate would permit an inference of actual malice. Curtis Publishing Company v. Butts, supra at 156-158.

There are also allegations of the animosity of Clement and the National Audubon Society to those who oppose their position on the DDT controversy.

These are supported by the deposition testimony of Victor Yannacone, an attorney who has worked with Clement and the National Audubon Society on environmental matters. He testified about discussions at the Environmental Defense Fund, with Clement and other associates of the National Audubon Society participating. These discussions centered around methods to silence or discredit opponents of their stand on DDT. He said that one plaintiff was "a constant subject of discussion" and another was "an occasional subject of discussion." This testimony would go to the question of the intent of defendants.

In sum there are questions of fact raised here about the state of mind and good faith of the defendants in publishing a charge that plaintiffs were lying. Viewing the evidence submitted and the inferences which might be drawn from it "in the light most favorable to the party opposing the motion," United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), questions of fact exist as to whether any or all defendants acted

with actual notice.

The motion is denied.

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So ordered.

Dated: New York, N. Y.
January 23, 1976

CHARLES M. METZNER

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97a

J. GORDON EDWARDS, Ph.D.,
THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

NOTICE OF MOTION AND MOTION
FOR AMENDMENT OF ORDER
TO AUTHORIZE
INTERLOCUTORY APPEAL

S I R S :

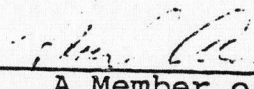
PLEASE TAKE NOTICE that upon the annexed affidavit of Floyd Abrams, Esq., sworn to February 5, 1976, and the accompanying Memorandum in Support of Defendant's Motion for Amendment of Order to Authorize Interlocutory Appeal, defendant, The New York Times Company, Inc., by its attorneys, will move this Court in Room 2201 of the United States Courthouse, Foley Square, New York, New York, on February 18, 1976, at 10:00 A.M., or as soon thereafter as counsel can be heard, for amendment of this Court's memorandum and order of January 23, 1976, by the addition thereto of a statement, pursuant to 28 U.S.C. §1292(b), that an immediate appeal from the said order may materially advance the ultimate termination of this litigation and that the said order involves several controlling questions of law as to which there is substantial ground for difference of opinion.

Dated: New York, New York
February 5, 1976

98a

Yours, etc.,

CAHILL GORDON & REINDEL

By 

A Member of the Firm
Attorneys for Defendant,
The New York Times Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

TO:

ROTHWELL, CAPELLO & BERNDTSON
Attorneys for Plaintiffs
1225 19th Street, N.W.
Washington, D. C. 20036
(202) 785-5025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99a

- - - - - x
J. GORDON EDWARDS, Ph.D., :
THOMAS H. JUKES, Ph.D. and :
ROBERT H. WHITE-STEVENSON, Ph.D., :
Plaintiffs, :
-against- : AFFIDAVIT
NATIONAL AUDUBON SOCIETY, INC., :
THE NEW YORK TIMES COMPANY, INC., : 73 Civ. 1927 (CMM)
ROBERT S. ARBIB, JR., :
ROLAND C. CLEMENT, and :
ELVIS J. STAHR, JR., :
Defendants. :
- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FLOYD ABRAMS, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill Gordon & Reindel, attorneys for defendant, The New York Times Company, Inc. ("the Times"). I am fully familiar with the facts of this action and with all of the previous proceedings herein. I submit this affidavit in support of defendant's motion seeking amendment of this Court's memorandum and order of January 23, 1976, by the addition thereto of a statement pursuant to 28 U.S.C. §1292(b), that an immediate appeal from the said order may materially advance the ultimate termination of this litigation and that the said order involves several controlling questions of law as to which there is substantial ground for difference of opinion.

100a

2. As more fully described in the accompanying memorandum of law, it is defendant's submission that case law emphasizing the importance of summary procedures in the defamation area should lead this Court to certify an interlocutory appeal pursuant to 28 U.S.C. §1292(b).

3. It is defendant's further submission that this Court's memorandum and order of January 23, 1976, presents a controlling question of law within the meaning of 28 U.S.C. §1292(b) as to whether, in a libel case governed by the constitutional standards first enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), an inference of actual malice, sufficient to withstand a defendant's summary judgment motion, may be drawn from assertions of an "inadequate" pre-publication investigation in the absence of a showing by the plaintiff that it can submit clear and convincing proof at trial that the defendant entertained serious doubts as to the truth of its publication.

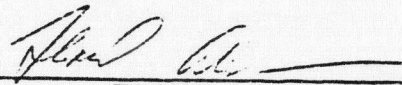
4. Defendant also submits that the Court's opinion raises a controlling question of law as to the existence of any issue of fact in the record of this case, the resolution of which in plaintiffs' favor would permit a jury properly to find, based upon clear and convincing evidence, that the Times article of August 14, 1972 herein alleged to be defamatory was published with actual malice, as defined in Sullivan and later decisions.

5. Defendant's motion is based upon the belief that correct answers to these questions would "materially advance the ultimate termination of the litigation" as provided in

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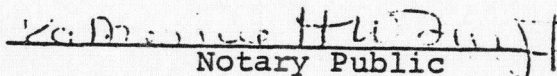
28 U.S.C. §1292(b) in that the Times would be dismissed as a party to this action and unnecessary waste of this Court's resources would be avoided.

WHEREFORE, it is respectfully submitted that defendant The Times' motion for amendment of this Court's memorandum and order of January 23, 1976 to authorize interlocutory appeal therefrom should be granted.



FLOYD ABRAMS

Sworn to before me this
5th day of February, 1976


Notary Public

KATHERINE H. W. SWIFT
Notary Public, State of New York
No. 31511-1000
Certificate filed in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

102a

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENSON, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

NY Times
Re: Edwards 2/5/76
FILES
2/24/76 RS
73 Civ. 1727 (CMM)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the annexed memorandum and the papers and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at his chambers, Foley Square, New York, New York, on the 18th day of February, 1976, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard,

(1) for an order pursuant to Rule 9(m) of the General Rules of this Court granting reargument of the motion for summary judgment of defendants, National Audubon Society, Inc., Robert S. Arbib, Jr., Roland C. Clement, and Elvis J. Stahr, Jr., decided by the order and decision of this Court filed January 26, 1976 (No. 43779) upon the grounds set forth in the accompanying memorandum; and

(2) alternatively, for an amendment of said decision and order so as to include therein a written statement pursuant to Section 1292(b) of Title 28, United

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States Code, setting forth the Court's opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate determination of this litigation.

Dated: New York, New York
February 4, 1976
5

GIFFORD, WOODY, CARTER & HAYS and
CROWE, MCCOY, AGOGLIA, CONGDON & ZWEIBEL

By

Charles F. Trenchard

A Member of the Firm of
GIFFORD, WOODY, CARTER & HAYS
Attorneys for Defendants,
National Audubon Society, Inc.
Robert S. Arbib, Jr., Roland C.
Clement and Elvis J. Stahr, Jr.
14 Wall Street
New York, New York 10004
(212) 349-7400

TO:

ROTHWELL, CAPELLO & BERNDTSON, ESQS.
Attorneys for Plaintiffs
1225 - 19th Street, N.W.
Washington, D. C.

RANDOLPH J. SEIFERT, ESQ.
Attorney for Plaintiffs
11 East 44th Street
New York, N. Y. 10017

CAHILL, GORDON & REINDEL, ESQS.
Attorneys for Defendant,
The New York Times Company, Inc.
80 Pine Street
New York, N. Y. 10005

73 Civ. 1727 (CMM)

UNITED STATES DISTRICT
COURT: SOUTHERN DISTRICT
OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
et al,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY,
INC., et al,

Defendants.

NOTICE OF MOTION

GIFFORD, WOODY, CARTER & HAYS
Attorneys for Defendants, Audubon,
Arbib, Clement Fourteen Wall Street
and Stahr. New York, N. Y. 10005
(212) 349-7400

Due and proper service of a copy of the within
is hereby admitted, this day of 19

Attorney for

s this day duly
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R & HAYS

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f Manhattan,
York, N. Y. 10005

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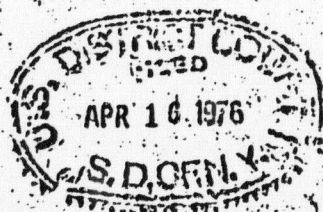
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Address:
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w York, N. Y. 10005

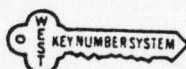
April 14, 1976. This motion
is denied. See opinion
in companion motion
by the New York Times

So ordered
Charles H. Lichtig
U. S. D.J.



to which his constitutional guarantees, particularly under the due process clause of the fifth amendment, are involved. That wonder is broadened where the taxpayer also asserts that the Commissioner of Internal Revenue has acted arbitrarily and capriciously in respect of the jeopardy assessment and/or the deficiency notices in violation of claimed constitutional rights."

[2] The hard-nosed attitude of the Government in the present case is difficult to comprehend. However, much as we sympathize with taxpayers' plight, our authority does not extend to the grant of the relief here prayed for. In *Human Engineering*, the Court noted (l.c. 67-68) that situations may exist "where some action by the trial judge may be indicated to avoid placing an undue burden on the court or to protect the integrity of the judicial process." Whether such action is appropriate in the circumstances of the present case is, however, for the Tax Court to determine. A separate proceeding in this Court to protect the litigating taxpayers against an asserted violation of their constitutional rights is not permissible under the instant facts. It follows that the complaint should be dismissed without prejudice.



J. Gordon EDWARDS, Ph.D., et
al., Plaintiffs,

v.

NATIONAL AUDUBON SOCIETY, INC.,
et al., Defendants.

No. 73 Civ. 1727.

United States District Court,
S. D. New York.

April 15, 1976.

Libel action against newspaper and
other defendants arose out of newspaper's

publication of an article in which the newspaper reported, inter alia, that a named source had identified certain individuals as "liars." After the defendant newspaper's motion for summary judgment was denied, the newspaper moved for certification permitting immediate appeal to the Court of Appeals from the interlocutory order. The District Court, Metzner, J., held that summary judgment was precluded by the existence of a fact question whether the newspaper reporter who wrote the offending article had been told that the names with which he was furnished were not to be included as members of a group who were assertedly being paid to lie; and that, in view of fact that case was ready for trial and that disposition at trial might render moot question sought to be reviewed, certification for an immediate appeal from the interlocutory order was unwarranted.

So ordered.

1. Federal Civil Procedure $\approx$ 2544

On motion by defendant newspaper for summary judgment in libel action, burden was on plaintiffs to show that defendants acted with actual malice in publishing the alleged libelous statement.

2. Federal Civil Procedure $\approx$ 2543

On motion for summary judgment by defendant newspaper in a libel case, though evidence relied on by plaintiffs and inferences therefrom are to be viewed in light most favorable to plaintiffs, such evidence must be measured against more stringent standards required by First Amendment. U.S.C.A. Const. Amend. 1.

3. Federal Civil Procedure $\approx$ 2141

The truth in our adversary system can only be ascertained when the jury listens to the testimony, observes manner in which testimony is given, and is afforded the opportunity of listening to cross-examination of all witnesses, and this function cannot be usurped by courts.

4. Libel and Slander $\approx$ 101(5)

In libel action against newspaper, it cannot be presumed as a matter of law that

a newspaper reporter is always telling the truth.

5. Libel and Slander — 51(5)

Reasons which warrant limitation of scope of libel suit in cases involving public figures do not protect a defendant against liability for deliberate falsehood. U.S.C.A. Const. Amend. 1.

6. Federal Civil Procedure — 2515

In libel action against newspaper, summary judgment was precluded by the existence of material issue of fact whether newspaper reporter had been told by his source that names which were furnished to reporter were not to be included as members of a group of scientists who were allegedly being paid to lie but rather were to be included in a group who had allegedly "misconstrued data," and thus whether newspaper was aware of the falsity of its published report that the source had identified the named individuals as "liars."

7. Courts — 405(14.8)

Where, inter alia, case was ready for trial and would be disposed of before argument would be heard by the Court of Appeals if certification permitting immediate appeal from an interlocutory order were granted, and where disposition at trial might render moot question sought to be reviewed, requirement that immediate appeal might materially advance ultimate termination of litigation was not met and certification permitting immediate appeal from interlocutory order was unwarranted. 28 U.S.C.A. § 1292(b); U.S.C.A. Const. Amend. 1.

Rothwell, Cappello & Berndtson, Washington, D. C., for plaintiffs; Thomas A. Rothwell, Washington, D. C., Randolph J. Seifert, New York City, of counsel.

Cahill, Gordon & Reindel, New York City, for defendant The New York Times Co., Inc.; Floyd Abrams, Eugene R. Scheiman, New York City, of counsel.

Gifford, Woody, Carter & Hays, New York City, Crowe, McCoy, Agoglia, Cong-

don & Zweibel, Mineola, N. Y., for defendants National Audubon Society, Inc., Robert S. Arbib, Jr., Roland C. Clement and Elvis J. Stahr, Jr.; Charles L. Trowbridge, New York City, and Morris Zweibel, Mineola, N. Y., of counsel.

METZNER, District Judge:

[1] Defendant The New York Times Company, Inc. moves for certification permitting immediate appeal to the Court of Appeals from an interlocutory order denying its motion for summary judgment. 28 U.S.C. § 1292(b). The other defendants join in that motion or, in the alternative, seek reargument of the order. The motion for reargument is granted and, upon reargument, the original opinion is modified to the extent that in this motion by defendants for summary judgment, the burden is on the plaintiffs to show that the defendants acted with actual malice in publishing the alleged libelous statement.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964), the Court set forth the rule that for a public figure plaintiff to recover for defamatory falsehood, he must prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

[2] On this motion the evidence relied on by the plaintiffs and the inferences to be drawn therefrom are to be viewed "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, 177 (1962); *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969). It is then measured against the more stringent standards under First Amendment protection applied against a plaintiff in determining a defendant's motion for summary judgment in a libel suit. *Miller v. News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971); *Guitar v. Westinghouse Electric Corporation*, 396 F.Supp. 1042, 1053 (S.D.N.Y.1975); *Meeropol v. Nizer*, 381 F.Supp. 29, 32 (S.D. N.Y.1974).

The article in the issue of "American Birds" with which the Times' story was concerned, stated that "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." The Times' story, both in headline and lead sentence, refers to the portion of the quotation from the magazine calling certain scientists liars. Under a subhead, "Accused Men Named," the story goes on to state that the writer of the quoted portion furnished the Times' reporter with the names of those who would be identified as liars. The Times' story published those names in the alleged offending article on August 14, 1972.

Defendant Arbib is the author of the quoted portion from "American Birds." On deposition, he unequivocally states that when he furnished the names to Devlin, the Times' reporter, he made it abundantly clear that they were not to be included as members of a group who were being paid to lie, but were to be included in a group referred to in the article who misconstrued the data.

[3] Devlin on deposition flatly denies that Arbib placed the furnished names in any specific category. Devlin says he merely asked for the names of persons referred to by the article and was given those which appear in the news story. In essence, we are confronted with what may be called a "one on one" situation. If the finder of the fact believes Arbib and disbelieves Devlin, then a jury would be justified in finding plaintiffs have sustained their burden of showing actual malice. If the rule were to be otherwise, then a libel action could never be maintained in a "one on one" situation. The truth in our adversary system can only be ascertained when the jury listens to the testimony, observes the manner in which the testimony is given, and is afforded the opportunity of listening to the cross-examination of both witnesses. The court cannot usurp this function, and the cases relied on for the proposition that where First Amendment rights are at stake, there is a heavier burden on the plaintiff to defeat a

defense motion for summary judgment, are not in point on the factual situation presented here.

[4, 5] Certainly it cannot be presumed as a matter of law that a reporter is always telling the truth. The reasons given by the Court for limiting the scope of libel suits under the impact of the First Amendment in cases involving public figures do not include protection against deliberate falsehood.

[6] The rule in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 352 (1968) is that:

"[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id.* at 731, 88 S.Ct. at 1325, 20 L.Ed.2d at 357.

This statement is a summary of the decisions in *New York Times Co. v. Sullivan*, *supra*, and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153, 87 S.Ct. 1975, 1990, 13 L.Ed.2d 1094, 1110 (1967). If the jury believes Arbib's statement and disbelieves Devlin, then the Times was aware of the falsity of the publication. The above quotation from the *St. Amant* case is followed by:

"[S]uch a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. . . . Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous pub-

lications as well as true ones." *St. Amant v. Thompson*, 390 U.S. at 731 32, 88 S.Ct. at 1326, 20 L.Ed.2d at 267.

The issue in the instant case is not ignorance or mere failure to inquire, or the protection of some erroneous publication. The issue is who is telling the truth and the resolution of that issue must await the trial.

As far as the Audubon defendants are concerned, the resolution of the disputed conversation between Arbib and Devlin will also dispose of that claim.

Consequently, the original order denying summary judgment is adhered to.

[7] The request for certification is denied. The case is ready for trial and a maximum of five trial days will be required. The trial will proceed on June 3, 1976. The case will be disposed of before argument would be heard by the Court of Appeals if certification were granted. Further, the disposition at trial may render moot the question sought to be reviewed. Thus, the requirement of Section 1292(b) that an immediate appeal "may materially advance the ultimate termination of the litigation" has not been met.

Counsel will arrange with Magistrate Hartenstine for a conference during the week of May 10, 1976, for the submission of a pretrial order.

So ordered.



Thomas E. POWERS, Plaintiff,

v.

WARNER BROS. RECORDS, INC.,
et al., Defendants.

WARNER BROS. RECORDS, INC., et
al., Third-Party Plaintiffs,

v.

JAMESTOWN ENTERPRISES, INC., an
Illinois Corporation, et al.,
Third-Party Defendants.

No. 75 C 2557.

United States District Court,
N. D. Illinois, E. D.

April 15, 1976.

On motion to dismiss a third-party complaint, the District Court, Grady, J., held that complaint failed to state a claim arising out of licensing agreement where agreement was replete with language indicating that third-party defendant was acting as agent for a disclosed principal; and that pleading as to fraudulent or negligent misrepresentation was insufficient.

Claim for breach of contract dismissed; claim for misrepresentation dismissed with leave to amend.

1. Principal and Agent ⇐ 189(1)

Third-party complaint alleging that agent was liable in contract due to allegedly false representation in licensing agreement failed to state a claim on which relief could be granted arising out of the licensing agreement, where such agreement was replete with language indicating that agent was acting as agent for a disclosed principal.

2. Principal and Agent ⇐ 136(2)

Where identity of principal for whom agent acts is sufficiently disclosed to third party, then principal and not agent is liable on the contract.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al

Plaintiffs

-against-

NATIONAL AUDUBON SOCIETY, INC.
THE NEW YORK TIMES COMPANY, INC.
et al.

Defendants

73 Civ. 1727
(CMM)

PRE-TRIAL ORDER

L

JURISDICTIONAL STATEMENT

This is an action for libel and defamation; the complaint herein was filed on April 18, 1973. A separate action was subsequently initiated against the individual defendants, Robert S. Arbib, Jr., Robert C. Clement and Elvis J. Stahr, Jr.; said action was joined with the instant action with the docket number appearing above pursuant to Order of this Court. Jurisdiction is based on diversity of citizenship and the amount in controversy exceeds the sum of \$10,000.00, exclusive of costs. Based on the foregoing, each of the defendants acknowledges the jurisdiction of the Court over each of the defendants. The parties also acknowledge court jurisdiction over the subject matter.

II

AMENDMENTS TO PLEADINGS

The pleadings are agreed to be deemed amended in accordance with the framing of the issues in this action as set out in Paragraph VII of this Pre-Trial Order.

The parties agree that the trial of this action should be based on this Order and upon the pleadings, as amended, except that the following issues raised by the complaint are expressly abandoned: None.

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III.

UNDISPUTED FACTS

The parties stipulate that the following facts are not in dispute in this action; each party reserving the right to object to the materiality of any stipulated fact and its relevancy to the issues. The parties shall not be precluded from introducing evidence and questioning witnesses in reference to these undisputed facts for the purpose of providing appropriate information and background material for the jury's consideration.

- a) Plaintiffs are three scientists, each having a Ph.D. degree.
Each plaintiff has been an active participant in the public controversy relating to the use of DDT.
- b) This action for libel and defamation by plaintiffs arises from the "Foreword" to the April 1972 issue of American Birds a publication of the National Audubon Society, Inc. in collaboration with the U. S. Fish and Wild Life Service; however the U. S. Fish and Wild Life Service had nothing to do with the drafting and publishing of the "Foreword"; the publication by the New York Times on August 14, 1972 of and concerning plaintiffs, among other things; and a letter to the New York Times dated August 14, 1972 bearing the name of defendant Robert S. Arbib, editor of American Birds.
- c) The above August 14, 1972 New York Times article is annexed as Exhibit II to the complaint. The information for the article was gathered by and the article was written by John Devlin, reporter for the New York Times. The identity of any other New York Times agents or employees who worked or contributed to this article, if any, cannot now be determined.
- d) The August 14, 1972 Times article dealt with the "Foreword" of the April 1972 issue of American Birds, a publication of the National Audubon Society in collaboration with the United States Fish and Wildlife Service. Said Foreword was written by Robert S. Arbib, Jr., editor of the publication; a copy of that Foreword from the edition of American Birds is annexed to the complaint as Exhibit I.

- e) The April 1972 issue of American Birds was mailed to subscribers and others in July of 1972.
- f) Devlin attempted to contact the five individuals named in his story. He succeeded in reaching three of them by telephone, namely, Jukes, White-Stevens and Spencer. The latter individual is not a party to this action.
- g) Under date of April 7th, Dr. Jukes, one of the plaintiffs herein, forwarded to Devlin some published material. Under date of August 8, Dr. White-Stevens, plaintiff herein, mailed to Devlin some similar material. Said materials are annexed to the New York Times Answer to Plaintiffs' Interrogatory No. 13 and 14.
- h) On the same day the Devlin article appeared in the New York Times, August 14, 1972, defendant Clement wrote and forwarded a letter to the New York Times. A copy of said letter dated August 14, 1972 is annexed as Exhibit III to the Complaint herein.
- i) The circulation of the New York Times on August 14, 1972 was 962,872 copies, including 12,362 of foreign circulation.
- j) On August 13, 1972 the Devlin story was also sent out over the New York Times' news service wire to 236 other newspapers

IV.

FACTUAL POSITION ON LIABILITY AND DAMAGES

A. CONTENTIONS OF PLAINTIFFS

The reputations of the three plaintiffs were injured by the reckless preparation, publication and distribution of the false and defamatory statements in the Foreword to the April, 1972 issue of American Birds; such publication by the individual defendants and National Audubon Society having been completed and confirmed at the time that National Audubon Society made the identities of plaintiffs available to the New York Times.

The reputations of the three plaintiffs were injured by the reckless preparation, publication and distribution of the false and defamatory statements in the August 14, 1972 edition of the New York Times newspaper.

The reputations of the three plaintiffs were injured by the reckless preparation, publication and distribution of the false and defamatory statements contained in the news release forwarded on August 13, 1972 by the New York Times through the New York Times Wire Service.

The reputations of the three plaintiffs were injured by the reckless preparation, publication and distribution of the false and defamatory statements contained in the letter dated August 14, 1972 forwarded by National Audubon Society to the New York Times.

All of the above publications were of and concerning plaintiffs and that all of the defendants are each liable, jointly and severally, for the dissemination of the damaging untruths concerning plaintiffs in that they knew that the matters published were false or were acting in reckless disregard of whether they were false or not.

As to the defendant National Audubon Society, Stahr, Clement and Arbib, the activities undertaken and completed by the publications above described were done with actual malice, as such activities were based upon an affirmative desire and plan to injure, defame and degrade plaintiffs through falsehood.

On As to the defendant New York Times, the damaging falsehoods set out in the National Audubon Society Foreword had been specifically brought to its attention prior to the publication of the August 13, 1972 news item to other newspapers via the New York Times Wire Service and prior to the publication of the damaging material in the New York Times on August 14, 1972.

The story written by Devlin and published by the New York Times was not hot and fast-breaking news. It was rather a feature and byline story written only after full opportunity for deliberation and investigation. At least three drafts of the August 14, 1972 article were written by Devlin.

The Devlin story was also sent out over the New York Times news service wire to 236 newspapers. At least five such subscribers to the New York Times news service wire, with a total circulation of 804,651 copies, picked up and printed the Devlin story in whole or in part.

B. CONTENTIONS OF DEFENDANT THE NEW YORK TIMES

The New York Times article of August 14, 1971 contained no statements of and concerning plaintiffs which are defamatory of them, in the context of the public debate over the use of DDT in which the plaintiffs have been active and in light of the language utilized by plaintiffs' witnesses as part of that debate.

The subject matter of this litigation and the Times article complained of by plaintiffs is the heated public controversy over the use of DDT and its effect on wildlife. This debate has been characterized by mutual allegations of misuse of scientific data and bitter charges and countercharges, including personal accusations of both sides.

In the course of the often strident DDT debate, plaintiffs have made public statements sharply critical of those who oppose plaintiffs' views and phrased in even harder language than reported by the Times.

The statements of the National Audubon Society, Inc. and Robert S. Arbib, Jr. reported in the August 14, 1972 Times article constituted no more than the verbal abuse commonly uttered in the course of the DDT controversy, similar in tenor and meaning to public statements plaintiffs themselves have made, and not reasonably understandable in a literal or defamatory sense.

Plaintiffs are public figures as that term has been defined in such cases as Butts v. Curits Publishing Co., 388 U.S. 130, 164 (1967) and Gertz v. Robert Welch, Inc. 418 U.S. 323, 342, 345 (1974), and this Court has so ruled. Therefore, plaintiffs cannot recover against defendant The New York Times Company in the absence of clear and convincing proof that the August 14, 1972 Times article was published with actual malice.

The New York Times Company published the August 14, 1972 article complained of by plaintiffs without actual malice, that is, without knowing that any statements contained therein were false and without reckless disregard as to the truth or falsity thereof.

The statements contained in the August 14, 1971 Times article complained of by plaintiffs constitute a substantially accurate rendition of information obtained by the Times reporter, John Devlin, from the "Foreword" to the April 1972 issue of American

Birds, a publication of the National Audubon Society, and from Robert S. Arbib, Jr., editor of American Birds. Devlin considered the American Birds "Foreword" and Mr. Arbib to be reliable and trustworthy sources and was reasonable in this belief.

Devlin did not know to be false or have any serious doubts as to the truth of information provided by him by the American Birds Foreword and Arbib.

The August 14, 1971 Times article did not assert the truth of the statements therein attributed to the American Birds Foreword and to Arbib.

The New York Times published three "Op Ed" pieces by Dr. Jukes, one, "Like It or Not, DDT is Good for You" on August 3, 1971, concerning the DDT controversy and appeared prior to the August 14 article complained of by plaintiffs in this action, and two, "Antibiotics and Mean" on October 2, 1972 and "On Trial Out West", on January 13, 1973, concerning subjects other than the DDT controversy and appeared after the August 14 article.

Plaintiffs have failed and are unable to show that they suffered any actual damage as a result of the August 14, 1972 Times article. Plaintiffs suffered no such damage.

Plaintiffs are not entitled to recover general or presumed damages against The New York Times Company.

Plaintiffs are not entitled to recover punitive damages against The New York Times Company.

C. CONTENTIONS OF THE DEFENDANTS NATIONAL AUDUBON SOCIETY, INC.,
ROBERT S. ARBIB, ROLAND C. CLEMENT AND ELVIS J. STAHR, JR.

1. That the defendants National Audubon Society, Inc., Robert S. Arbib, Roland C. Clement and Elvis J. Stahr, Jr. did not libel the plaintiffs.
2. That there was a heated public controversy concerning DDT and each of the parties was an active participant therein; and that any writing or utterance by these defendants was protected by the First Amendment to the Constitution of the United States.
3. In the course of the heated public controversy over DDT, plaintiffs have made public statements sharply critical of those who oppose plaintiffs' view often in harsh and inflammatory language.

4. That in whatever these defendants did, they were not guilty of actual malice.

5. These defendants did not libel the plaintiffs.

6. That the plaintiffs were not damaged by reason of any publication or utterance by these defendants.

V.

LIST OF WITNESSES

A. WITNESS FOR PLAINTIFFS

J. Gordon Edwards
Thomas H. Jukes
Robert H. White-Stevens
Victor J. Yanacone, Jr.

Experts

John M. Buchanan — Scientific Methods, Standards and Practices
Maurice J. Freedman — Library Science and Research
Philip H. Marvin — Entomologist and Ornithologist

B. WITNESSES FOR THE DEFENDANT THE NEW YORK TIMES COMPANY

John Devlin

C. WITNESSES TO BE CALLED BY DEFENDANTS NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, ROLAND C. CLEMENT, AND ELVIS J. STAHR, JR.

Roland C. Clement
Robert S. Arbib, Sr.
Elvis J. Stahr, Jr.
Dr. Charles Wurster — Professor at the New York State University, Stonybrook, New York
John Charles Devlin, Sr.
Victor J. Yanacone

VL

EXHIBITS

A. EXHIBITS WHICH MAY BE USED BY PLAINTIFFS

- PX 1 Forward To American Birds, April 1972, Volume 26
PX 2 Clipping from August 14, 1972 New York Times, Page 33
PX 3 Letter Arbib to New York Times, August 14, 1972
PX 4 Jukes letter to John Oakes, New York Times, August 15, 1972, with enclosure (PX 4(A))
PX 5 Jukes letter to Devlin dated September 21, 1972
PX 6 "Pesticide Influence on Bird Population, Philip Marvin, 6 pages
PX 7 November 1972 Readers Digest, opposite page 206
PX 8 Letter, Jukes to Elvis Stahr, August 7, 1972

- PX 9 Letter from Ruth Troschianiec to Jukes, dated August 10, 1972
- PX 10 Letter from Jukes to Troschianiec, dated August 15, 1972
- PX 11 Letter Chaplin B. Barnes to Jukes, August 22, 1972
- PX 12 "The Evolution of a Magazine", page 46, Audubon Magazine, January 1973
- PX 13 "Roger Tory Peterson—Audubon Medalist, 1971", Audubon Magazine, page 105, January 1972
- PX 14 Material submitted by Jukes to Devlin, August 7, 1972 as follows: "DDT: The Chemical of Social Change," Jukes, Clinical Toxicology, December, 1969 "DDT, Human Health and the Environment", Jukes, November, 1971, appearing in Environmental Affairs; Newsletter Hawk Mountain Sanctuary Association, March, 1971; Newsletter Hawk Mountain Sanctuary Association, March, 1972; and Roger Tory Peterson "The Birds", Life Nature Library, undated
- PX 15 Letter and enclosures from White-Stevens to Devlin, mailed August 8, 1972 comprising the following: List of selected pesticide authorities, 3 pages; "World Food Production Potential", Robert White-Stevens, reprint from American Chemical Society, Volume 14, September, 1969, 38 pages; "Into the Future with Agricultural Chemicals," Robert White-Stevens, 7 pages; "Pesticides: Friends or Enemies," appearing in Clipper Magazine, undated; "The Role of Pesticides in Food Production and Health," Robert White-Stevens, from the Agricultural Division, American Cyanamid Company, Princeton, New Jersey, 28 pages; "The Facts and Fallacies of Silent Spring," Robert White-Stevens, "The Role of Agricultural Chemicals in Feeding an Exploding Population," Robert White-Stevens, presented at the 66th Annual Conference of the Association of Food & Drug Officials, June, 1962, 18 pages; "The Contribution of the Farmer to the Environment," Robert White-Stevens, address before the Indiana Farm Bureau Federation, November, 1970, 28 pages; "The Ecological and Environmental Effects of Agronomic Chemicals, Robert White-Stevens, Presented before The American Society of Agronomy, August 17, 1971
- PX 16 "Birds on the Rise" by Philip H. Marvin, Bulletin of the Entomological Society of America, September 1964
- PX 17 Letter to John Van Doorn from White Stevens, dated September 7, 1972
- PX 18 Letter to Robert White-Stevens from John Van Doorn, dated August 17, 1972
- PX 19 Letter to John C. Devlin from Robert White-Stevens, dated August 15, 1972
- PX 20 New York Times Index 1972
- PX 21 "Audubons Attack Pesticide Industry, article Seattle Post-Intelligencer, August 20, 1972
- PX 22 "Pesticide Industry, Scientists Accused of Lying on DDT," Houston Chronicle August 14, 1972
- PX 23 "Magazine: DDT Backers Lying," article Times-Democrate, Davenport, Iowa, August 14, 1972
- PX 24 "Are pesticide industry and 'scientist-spokesmen' lying?" Whig-Standard, Ontario, Canada, August 17, 1972
- PX 25 The Minneapolis Tribune, "Magazine disputes claim that U. S. birds thriving," September 29, 1972

B. EXHIBITS WHICH MAY BE USED BY DEFENDANT NEW YORK TIMES

- DX 1 "An Appraisal of Recent Developments in the Regulatory Situation of DDT" Jukes, T. H., Clinical Toxicology 5(3), 1972, pp. 427-436
- DX 2 "DDT, Human Health and Environment", Jukes, T. H., Environmental Affairs, Vol. 1, No. 3, pp. 534-564 (Nov. 1971)
- DX 3 "Pros and Cons in the Case for DDT", Jukes, T. H., Preventive Medicine, Vol. 1, No. 3, pp. 400-408 (Aug. 1972)
- DX 4 "Like it or Not, DDT is Good for You", Jukes, T. H., New York Times, August 3, 1971
- DX 5 "Scientific Agriculture at the Crossroads," Agrichemical Age, pp. 8-11, (Nov. 1972)
- DX 6 "DDT: The Chemical of Social Change," Jukes, T. H., Clinical Toxicology, 2(4), pp. 359-370, (Dec. 1969)
- DX 7 Statement of Thomas H. Jukes at Seattle Hearings On DDT, October 15, 1969 (unpublished)
- DX 8 "Dividends from DDT" Letters to the Editor. C&EN, (March 17, 1969)
- DX 9 "The True Facts About Pesticides and the Environment", Farm Chemicals, (March, 1967)
- DX 10 "People and Pesticides", American Scientist, Vol. 51, No. 3, pp. 355-361 (Sept. 1963)
- DX 11 "Agriculture, Wildlife and Pesticides", The Backlog, Vol. 38, No. 1, (Aug. 1963)
- DX 12 "A Town in Harmony", Chemical Week, p. 5, (August 18, 1962)
- DX 13 "Chemicals and Life", unpublished script for WCBS Speak Up, (Oct. 2, 1962)
- DX 14 "The Delaney 'Anti-Cancer' Clause", Preventive Medicine, '2: 133-139 (1973)
- DX 15 "DDT stands Trial Again", Bioscience 22(11): 670 (1972)
- DX 16 "When Friends or Patients Ask about DDT", J Am Med Assoc, 229: 571 (1974)
- DX 17 The Gypsy Moth, Edwards, J. G., (unpublished manuscript)
- DX 18 Statement by J. Gordon Edwards, Ph.D., before the Committee on Agriculture (March 18, 1971)
- DX 19 "Who Defends DDT?", Pertinent Statements and Data Compiled by J. Gordon Edwards (unpublished manuscript)
- DX 20 "Decision on Use of DDT," Statement of Sen. Goldwater dealing with position of Dr. Edwards on DDT, Congressional Record, S-11545, S-11546 (July 24, 1972)
- DX 21 "The Infamous Ruckelshaus DDT Decision" (press release dated June 26, 1972)

- DX 22 "Environmental Kangaroo Court Concerning Dichlorp Diphenyl Trichloroethane (DDT)" unpublished paper presented at 71st National Meeting of American Institute of Chemical Engineers (Feb. 23, 1972)
- DX 23 Open Letter - "Bird Reproduction and Abundance." (unpublished manuscript by Dr. Edwards as President of Sponsors of Science)
- DX 24 "DDT in British Rain", Science - Adams - No. 3, (Dec. 18, 1972)
- DX 25 White-Stevens, R., "World Food Production Potential," Symposium on Protein from Petroleum: The Competition - Agricultural and Food Chemistry and Microbia Chemistry and Technology, American Chemical Society, Division of Petroleum Chemistry Vol. 14, No. 3, pp. B24-B34, (Sept., 1969)
- PX 26 White-Stevens, R., "The Facts and Fallacies of Silent Spring"
- DX 27 "Science or Hunger", Agriculture Division American Cyanamid Company, Princeton New Jersey (unpublished manuscript)
- DX 28 The Economic and Environmental Impact of Pesticides, Address delivered by Robert White-Stevens, Bureau of Conservation and Environmental Science, Rutgers University, The State University of New Jersey, New Brunswick, New Jersey at the 52nd Annual Meeting of the American Farm Bureau Federation, Houston, Texas, to the Natural Resources conference. (December 7, 1970.
- DX 29 "Pesticides are Essential" (unpublished manuscript)
- DX 30 White-Stevens, R., "The Role of Agricultural Chemicals in Feeding and Exploding Population", Association of Food & Drug Officials of the United States, Vol. 27, No. 1 (Jan. 1963)
- DX 32 White-Stevens, R., "The Contribution of the Farmer to the Environment", Address before the 92nd Annual Convention of the Ohio Grain Feed and Fertilizer Association at Columbus, Ohio, (Feb. 9, 1971)
- DX 33 White-Stevens, R., "The Role of Pesticides in Food Production and Health " presented before the Southern Pesticide Applicators School of USDA Coop. Ext. Service with Texas A&M Ext. Service in Texas, (1968)
- DX 34 White-Stevens, "The Ecological and Environmental Effects of Agronomic Chemicals Presented before the American Society of Agronomy 1971 Annual Meeting Sessions Agronomy and Environmental Quality, Statler Hilton Hotel, New York, N. Y. (Aug. 17, 1971)
- DX 35 White-Stevens, R., "Pesticides: Friends or Enemies Are we Really Poisoning Our World?" Clipper Magazine, (Feb. 1972)
- DX 36 Better dated January 5, 1972, from Chaplin B. Barnes, Assistant to President, Audubon Society to Mrs. Anita C. Hockstein, Solicitation Editor, Environmental Law Center, Boston College Law School.
- DX 37 Memorandum, dated August 14, 1972 from R. C. Clement to CHC, CB, RB, and R. Arbib; Re: Christmas Bird Count data

(Supplement to Section VI B
of Pre-Trial Order)

- DX 41 "DDT Defended - 'Unbelievability' of Charges Aired," editorial by J. Gordon Edwards, The Sunday Oregonian, December 28, 1969
- DX 42 J. Gordon Edwards Letter "To All Concerned Persons" dated 20 January 1970
- DX 43 Thomas H. Jukes, "Like It or Not, DDT is Good for you," The New York Times, August 3, 1971
- DX 44 Letter to the Editor from Roderick A. Cameron, Executive Director, Environmental Defense Fund, New York Times, August 18, 1971, p. 36, col. 3
- DX 45 Letter to the Editor from Thomas H. Jukes, The New York Times, September 4, 1971, p. 20, col. 3
- DX 46 Thomas H. Jukes, "Antibiotics and Meat," The New York Times, October 2, 1972
- DX 47 Thomas H. Jukes, "On Trial Out West," The New York Times, January 13, 1973
- DX 48 Letter to the Editor from Thomas H. Jukes, The New York Times, August 24, 1969, p. 11, col. 7
- DX 49 Letter to the Editor from Elvis J. Stahr, President National Audubon Society, The New York Times, August 31, 1969, p. 11, col. 7
- DX 50 Letter to the Editor from Robert White-Stevens, The New York Times, September 14, 1969
- DX 51 Letter to the Editor from T.H. Jukes, The New York Times, October 5, 1969

- DX 52 J. Gordon Edwards, Dichlorodiphenyl Trichloroethane
(Should DDT Be Banned or Praised?) Water - 1972
- DX 53 Roland C. Clement, The Problem of Persistent Pesticides
Use, April 19, 1968
- DX 54 Robert White-Stevens, The Contribution of the Farmer
to the Environment, February 9, 1971
- DX 55 Robert White-Stevens, Pesticides or Hunger (Abstract)
- DX 56 Robert White-Stevens, The Agriculturist and the Food
Additive Dilemma
- DX 57 Robert White-Stevens, Fads and Fallacies in the Name of
Ecology, Dec. 12, 1972
- DX 58 Robert White-Stevens, Fads and Fallacies in the Name of
the Environment, January 25, 1974
- DX 59 J. Gordon Edwards, Facts and Fallacies Concerning DDT,
dated November 1973
- DX 60 Page 2 of Audubon Leader's Conversation
Guide April 15, 1963 (produced by Dr. White-Stevens)
together with "Rebuttal to Mr. Clement's Scurrilous
Assertion" by Dr. White-Stevens,
- DX 61 J. Gordon Edwards letter to National Audubon Society
dated November 20, 1969
- DX 62 J. Gordon Edwards letter to National Audubon Magazine
dated November 23, 1969
- DX 63 J. Gordon Edwards letter to National Audubon Society
dated November 29, 1969
- DX 64 J. Gordon Edwards letter to Les D. Line, Editor,
Audubon Magazine dated December 5, 1969
- DX 65 Les Line letter to Sharon Peponis dated January 13, 1970
- DX 66 J. Gordon Edwards letter to Les Line, Editor, Audubon
Magazine dated February 17, 1970

- DX 38 Memorandum, dated August 15, 1972 from R. Clement to Chap. Barnes; Re: The Question of Liars
- DX 39 Letter, dated May 23, 1973, from Elvis J. Stahr, President, National Audubon Society to John L. J. Hart, Esq.
- DX 40 Memorandum, dated September 1, 1973 from Robert Arbit to C. H. Callison; Re: AMERICAN BIRDS MONTHLY REPORT

*The preceding list is incomplete due to the incomplete production to the Times of materials demanded of plaintiffs'. Plaintiffs have agreed to furnish such materials and upon receipt the Times will complete its listing of exhibits subject to the possibility of newly discovered materials prior to or during the trial of this action. Plaintiffs have agreed to such addition.

C. EXHIBITS ON BEHALF OF DEFENDANTS NATIONAL AUDUBON SOCIETY, INC.
ROBERT S. ARBIB, ROLAND C. CLEMENT AND ELVIS J. STAHR, JR.

- *NX 1 Typewritten draft of the Devlin article including summaries (Exhibits A-1 to A-9 for identification on the Devlin deposition).
- NX 2 All handwritten notes of Devlin (Exhibit 1A-1D, 1A-2D, 3A-3F, 4, 5A and 5 for identification on Devlin deposition).
- NX 3 Letters and materials supplied by plaintiffs to the New York Times for the period between January 1, 1972 and August 14, 1972.
- NX 4 Article, The Pesticides Controversy by Roland C. Clement published in an Environmental Affairs, Volume 2, No. 3, Winter, 1972.
- NX 5 Volume of plaintiffs writings, Exhibit 4 for identification on the deposition of Dr. Edwards' deposition).
- NX 6 January 20, 1970 letter (release written by Dr. Edwards), (Exhibit 6 for identification on Dr. Edwards' deposition).
- NX 7 Letter of December 5, 1969 from Dr. Edwards to Les Lyne(?).
- NX 8 Hearings at the House of Representatives — Federal Pesticides Control Act, 1971 — held February 22 through March 25, 1971.
- NX 9 Volume entitled DDT, selected statements from Washington on DDT hearings, October 14-16, 1969 compiled by Montrose Chemical Corp. of California.
- NX 10 Plaintiffs' income tax returns as requested.

VII.

TRIABLE ISSUES

A. PLAINTIFFS' STATEMENT OF THE ISSUES TO BE TRIED

1. Plaintiffs contend that the defendants and each of them are jointly and severally liable for general compensatory, and punitive damages for failing and refusing to take such reasonable steps to avoid the defamation of plaintiffs, and by failing and refusing to take such reasonable steps to minimize and mitigate the resultant harm and damage to plaintiffs caused by the actions of defendants.

2. Whether defendants or any of them prepared, published, and/or distributed:

- a) The Foreword to the April 1972, issue of American Birds.
- b) The publication to the New York Times of the identities of plaintiffs
- c) The publication by the New York Times on its Wire Service on August 13, 1972
- d) The publication by the New York Times of the Devlin article of August 14, 1972
- e) The publication by National Audubon Society of its letter to the New York Times, dated August 14, 1972

That the New York Times was motivated by actual malice in the publication of the August 14, 1971 article concerning plaintiffs and others for the following reasons and on the following grounds:

- a) Plaintiffs are not liars.
- b) The New York Times article upgraded and aggravated the statements appearing in the American Birds Foreword.
- c) The Times article was not a fair and accurate report of information furnished by Audubon.
- d) The New York Times was repeatedly told, prior to publication, that the statements that they were planning to publish were false and libelous.
- e) The New York Times had an unusual opportunity to investigate the truth of the matters asserted.
- f) The New York Times did so investigate, and material pertinent to the issue was made available to the Times prior to the August 14, 1972 publication.
- g) The Times was specifically warned at least twice of the defamation potential inherent in the proposed publication.

- h) The Times published the August 14, 1972 article with wanton and reckless disregard for the rights of plaintiffs.
- i) The Times did not publish Dr. Jukes' letter to the Editor dated August 15, 1972 which protested the publication of the Times article.
- 4. Whether defendants or any of them are liable to plaintiffs for the defamatory statements of and concerning plaintiffs published and broadcast by the defendants or any of them.
- 5. Whether in addition to compensatory damages, plaintiffs are entitled to punitive damages by reason of actual malice on the part of defendants or any of them.
- 6. Whether the publication on August 13, 1972 by the New York Times of the story sent to subscribing newspapers on the New York Times Wire Service and whether the publication by the defendant New York Times of the Devlin article on August 14, 1972 with its accompanying headline were published when the New York Times had reason to believe that the statements contained therein were false and defamatory and whether said statements were published with reckless disregard as to whether said statements were false or not.

B. DEFENDANT THE NEW YORK TIMES COMPANY'S STATEMENT OF ISSUES TO BE TRIED

- 1. Whether the Times article of August 14, 1972 contained any statements of and concerning plaintiffs which are defamatory of them, in light of the context in which they were uttered and in light of statements made by plaintiffs themselves with respect to others involved in the public debate over the use of DDT.
- 2. Whether defendant the New York Times Company published the article of August 14, 1972 with actual malice, i.e., with knowledge that the statements contained therein were false or with reckless disregard as to the truth or falsity thereof.
- 3. Whether plaintiffs are entitled to actual (special) damages, general (presumed) damages or punitive damages by reason of the alleged actual malice on the part of the New York Times Company.

C. THE ISSUES OF THE DEFENDANTS NATIONAL AUDUBON SOCIETY, INC., ROBERT ROLAND C. CLEMENT AND ELVIS J. STAHR, JR.

1. Did the defendants' or any of them libel the plaintiffs or any of them?
2. If the answer to Item 1 is in the affirmative, was this libel per se?
3. If Items 1 and 2 are answered in the affirmative, were these defendants guilty of actual malice?
4. If the above items are answered in the affirmative, did the plaintiffs or any of them suffer any compensatory damages?
5. If the answer to the above item is in the affirmative, are the plaintiffs or any of them entitled to any punitive damages?

VIII.

OTHER

This action is expected to take six to eight days for trial to a jury.

The Exhibits identified in Part VI hereof are conceded to be genuine without conceding admissibility. The parties will endeavor to reach agreement as to admissibility prior to the trial of this action.

APPROVED:

Robert S. Arbib, Roland C. Clement, Elvis J. Stahr
Robert S. Arbib
 Attorney for Plaintiffs

 Attorney for Defendant
 THE NEW YORK TIMES COMPANY

 Attorney for Defendants
 NATIONAL AUDUBON SOCIETY, INC.
 ROBERT S. ARBIB, ROLAND C.
 CLEMENT AND ELVIS J. STAHR, JR.

 Attorney for Defendants
 NATIONAL AUDUBON SOCIETY, INC.
 ROBERT S. ARBIB, ROLAND C.
 CLEMENT AND ELVIS J. STAHR, JR.

SO ORDERED:

 U. S. D. J.

125a

Defendants.

BEST COPY AVAILABLE

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 1

This is a libel action commenced by three individuals -- Dr. Edwards, Dr. Jukes and Dr. White-Stevens -- against two corporations, the National Audubon Society, Inc. and The New York Times Company, Inc. (the "Times") and against three individuals employed by the National Audubon Society -- Messrs. Arbib, Clement and Stahr.

Thus, two of the defendants in this lawsuit brought by three individual plaintiffs are corporations. That fact, however, is of no relevance to your consideration of this case. The case must be considered and decided by you as being among persons of equal standing in the community, of equal worth and holding the same or similar stations in life. The corporation is entitled to the same fair trial in your hands as a private individual. The law is no respecter of persons. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice. You took an oath at the commencement of this case that this case would be decided by you without regard to the consequences to any of the parties involved. It must be decided by you on a fair, impartial, unbiased basis, based entirely on the law as I set it forth for you on the evidence presented to you in the courtroom.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 2

Each of the parties in this lawsuit is to be considered separately by you with respect to the legal rights at issue here. That is to say, each of the three plaintiffs should be considered separately by you in determining whether any of them are entitled to any recovery. Similarly, you are to consider separately the question of whether any recovery may be permitted against any one or more of the five defendants in the case.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 3

I have determined that each of the plaintiffs -- Dr. Edwards, Dr. Jukes and Dr. White-Stevens -- is a public figure in the context of this case. The law uses the term public figure to describe persons who may not have any general fame but who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and in so doing, "invite attention and comment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). I have ruled that the plaintiffs are public figures under this definition because of their prominence in the controversy over the uses of DDT through their writings and lectures.

The debate over whether DDT is needed to prevent disease and protect agricultural crops or whether, on the other hand, DDT causes harm to the environment and to wildlife that outweighs its benefits, is clearly a matter of profound public concern. The Founding Fathers recognized that free and uninhibited debate on such issues is of great importance to our democracy, and for that reason they included as the first guarantee of the Bill of Rights of the United States Constitution the First Amendment rights of freedom of speech and of the press. The First Amendment protects the right of publishers and writers to speak out in a blunt and uninhibited manner on public controversies and on individuals who have emerged as public figures in the context of such controversies.

Therefore, public figures such as the plaintiffs in this case, may exercise the right of any citizen to seek damages in court for a publication which they claim libeled them, but

when they do so, special rules apply to the lawsuit which you must follow and which I will explain to you.

- (i) Time, Inc. v. Firestone, No. 74-944 (U.S. Supreme Court, filed March 2, 1976) Slip Opinion at 4-6.
- (ii) Gertz v. Robert Welch, Inc., 418 U.S. 232, 336, 342 (1974).
- (iii) Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).
- (iv) New York Times v. Sullivan, 376 U.S. 254, 279-80, 285-86 (1964).
- (v) Buckley v. Littel, 394 F.Supp. 918, 931, 941-42 (S.D.N.Y. 1975).
- (vi) Adey v. United Action for Animals, Inc., 361 F.Supp. 457, 460 (S.D.N.Y. 1973), aff'd mem., 493 F.2d 1397 (2d Cir.), cert. denied, 419 U.S. 842 (1974).

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 4

The burden is on the plaintiffs to prove every essential element of their claim of defamation -- elements which I will describe to you shortly. In certain elements of plaintiffs' case they are required to prove their assertions by a preponderance of the evidence. A preponderance means the greater part of the evidence. It means proof that something is more likely so than not so. A preponderance of the evidence does not mean the quantity of witnesses or other evidence; rather, the phrase refers to the quality of the evidence, that is, its persuasive quality, the weight and effect it has on your minds. In other words a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, is more persuasive, and produces in your minds the belief that what is sought to be proved is more likely to be true than not true. If the evidence going to any of the essential elements of plaintiffs' claim does not support that aspect of their claim, or if you are unable to say that there is a preponderance on either side, then you cannot enter a verdict for plaintiffs since plaintiffs will not have carried their burden of proof.

- (i) IX Wigmore, Evidence,
§ 2498 (3d ed. 1940).
- (ii) McCormick, Evidence,
§ 339 (2d ed. 1972).

As I will later instruct you in detail when I define for you the essential elements of plaintiffs' claim, plaintiffs have the burden of proving one element of their claim by clear and convincing evidence, which is a higher standard than the

preponderance of the evidence. In a case such as this one, where the subject matter of the statements plaintiffs complain about relates to an important public controversy, and where plaintiffs are described by the law as public figures because of their voluntary participation in that controversy, plaintiffs, in order to recover in this Court, must prove with convincing clarity, that is, with clear and convincing evidence, that the statements at issue were published with actual knowledge of their falsity or with reckless disregard of the truth -- that is, despite serious doubts about whether the statements were true.

- (i) Gertz v. Robert Welch, Inc.,
418 U.S. 323, 342 (1974)
- (ii) New York Times Co. v. Sullivan,
376 U.S. 254, 285-86 (1964)
- (iii) Goldwater v. Ginzburg, 414 F.2d 324,
341 (2d Cir. 1969), cert. denied,
396 U.S. 1049 (1970)
- (iv) Adey v. United Action for Animals, Inc.,
361 F.Supp. 457, 460 (S.D.N.Y. 1973),
aff'd mem., 493 F.2d 1397 (2d Cir.),
cert. denied, 419 U.S. 842 (1974)

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 5

There are four things that these plaintiffs must prove in order to prevail in this libel action. You may return a verdict for plaintiffs only if you make all four of the following findings:

(i) That the statements plaintiffs complain about refer to plaintiffs;

(ii) That the statements plaintiffs complain about are defamatory as that term is defined for you in these instructions;

(iii) That the statements plaintiffs complain about are false; and

(iv) That the statements were published with knowledge of their falsity or despite serious doubts as to their truth. I shall refer to this requirement as "actual malice" and shall define it for you at greater length later in this charge.

The burden is on the plaintiffs to prove the first of these elements by a preponderance of the evidence.

The burden is stricter with regard to the fourth element - the element of actual malice. The plaintiffs have the burden of establishing by clear and convincing evidence that the publication was made with actual malice.

- (i) . Gertz v. Robert Welch, Inc.,
418 U.S. 323, 342-43 (1974).
- (ii) St. Amant v. Thompson, 390 U.S.
727, 731 (1968).
- (iii) Goldwater v. Ginzburg, 414 F.2d
324, 341 (2d Cir. 1969), cert.
denied, 396 U.S. 1049 (1970).

If you find that any of the plaintiffs has established each and every one of these four elements by the standards here explained, you may find for that plaintiff. If you find that plaintiffs have failed to establish any one element as against any defendant, then it is your duty to find for that defendant.

As has been said, the burden of proving each and every one of these elements is on the plaintiffs. If plaintiffs fail to submit enough evidence to meet that burden, the defendant is entitled to a verdict and is not obliged to call any witnesses or to introduce any evidence.

I shall now define for you in more detail the four elements of plaintiffs' claim.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 6

You must first decide whether plaintiffs have met their burden of proving by a preponderance of the evidence that the particular statements alleged to be libelous were published of and concerning the plaintiffs. In determining whether the statements complained of refer to plaintiffs, the relevant passages should be read as a whole and construed in context, and the allegedly defamatory words are to be construed as persons generally understand them and according to their ordinary meaning, not with the close precision expected from lawyers and judges. You must give the text a fair reading and not enlarge upon or strain the natural meaning of the words used.

- (i) Drug Research Corp. v. Curtis Publishing Co.,
7 N.Y.2d 435, 439-40, 199 N.Y.S.2d 33, 166
N.E.2d 319 (1960).
- (ii) Julian v. American Business Consultants, Inc.,
2 N.Y.2d 1, 15, 18, 155 N.Y.S.2d 1, 137
N.E.2d 1 (1956).
- (iii) Burnett v. NYM Corp., (Supreme Court, New York
Co., December 15, 1975), 174 N.Y.L.J. 10.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 7

I come to the second element of plaintiffs' claim -- proof by a preponderance of the evidence that the statements plaintiffs complain about defamed or libeled them. A statement is defamatory of a plaintiff if it appreciably injures his reputation. In deliberating whether plaintiffs have met their burden of proving defamation, you must not give any consideration to whether plaintiffs suffered embarrassment or discomfort as a result of the statements they complain about. Plaintiffs' "own reaction . . . has no bearing upon [their] reputation."

Kimmerle v. New York Evening Journal, Inc.,
262 N.Y. 99, 102-03, 186 N.E. 217, 218 (1933).

When I instruct you that a defamatory statement is one which appreciably injures reputation, I mean a statement which tends to expose a person to public contempt, ridicule, aversion or disgrace, to make him shunned or avoided, or deprived of the friendly association of a considerable number of respectable members of the community.

- (i) Mencher v. Chesley, 297 N.Y. 94, 100,
75 N.E.2d 257, 259 (1947).
- (ii) Kimmerle v. New York Evening Journal, Inc.,
supra, 262 N.Y. at 102, 186 N.E. at 218.

Even if you find that the words plaintiffs complain about, if taken literally, would have these effects, you may not find for plaintiffs on the issue of defamation unless in your judgment the ordinary reader would understand the words in a defamatory sense. If on the other hand it is your judgment that the words were a kind of name-calling or verbal

abuse uttered in the course of angry debate, and that the ordinary reader would understand the words as epithets, insults or rhetoric used in a figurative and not a serious sense, then you may not return a verdict for plaintiffs. In that respect, substantial evidence has been introduced indicating that plaintiffs themselves used language at least as harsh as that used against them. You may consider such evidence in determining whether the words at issue here are defamatory.

- (i) Old Dominion Branch No 496, National Association of Letter Carriers AFL-CIO v. Austin, 418 U.S. 264, 284 (1974).
- (ii) Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 14 (1970).
- (iii) Time, Inc. v. Johnston, 448 F.2d 378, 384-85 (4th Cir. 1971).
- (iv) Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966).
- (v) Fram v. Yellow Cab Co. of Pittsburgh, 380 F.Supp. 1314, 1326-32 (W.D.Pa. 1974).
- (vi) Thuma v. Hearst Corp., 340 F.Supp. 867, 870-72 (D.Md. 1972).
- (vii) Restatement of Torts § 566, comment e at 12 (Tent. Draft No. 21, 1975).

In deciding whether the statements plaintiffs complain about have a defamatory meaning, it is necessary to make a judgment based upon the material as a whole, rather than on the basis of isolated or detached individual sentences or statements. The test is whether the overall effect of the statements on the ordinary reader is defamatory.

(i) Reynolds v. Pegler, 223 F.2d 429, 432
(2d Cir.), cert. denied, 350 U.S. 846
(1955).

(ii) Robert v. Troy Record Co., 31 App.Div.2d
574, 294 N.Y.S.2d 723 (3d Dep't 1968).

If you find that plaintiffs have carried their burden of showing by a preponderance of the evidence that the statements they complain about are defamatory, then you should consider whether plaintiffs have met the other requisite tests. If you do not find that the statements are of such a character, then you must find for the Times.

[Plaintiffs must prove falsity]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 8

The third element of proof required of plaintiffs is a showing by a preponderance of the evidence that the statements they complain about are false. In general, truth is an absolute defense to a libel claim.

Commonwealth Motor Parts Limited v.
Bank of Nova Scotia, 44 App.Div.2d 375,
378, 355 N.Y.S.2d 138, 141 (1st Dep't
1974).

However, there is no obligation in this case that the defendants prove truth in order to prevail. Defendants are not required to take any position as to truth or falsity. Rather what is required -- under the special rules of law applicable to this case and stemming from the constitutional guarantees of freedom of speech and press -- is that defendants prove the falsity of the statements they complain about by a preponderance of the evidence.

- (i) New York Times v. Sullivan, 376 U.S.
254, 271 (1964).
- (ii) Goldwater v. Ginzburg, 414 F.2d 324,
338 (2d Cir. 1969), cert. denied,
396 U.S. 1049 (1970).

Only if you are persuaded by a preponderance of the evidence that the statements plaintiffs complain about are false may you consider the next element of proof required of plaintiffs. Otherwise you must find for the Times.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 9

The final element of plaintiffs' claim is proof by clear and convincing evidence of actual malice held by the defendants towards the plaintiffs. A publication is made with "actual malice," as that term is used in this charge, if it is made with knowledge that it was false, or with reckless disregard of its truth -- that is, despite serious doubts as to its truth.

- (i) St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
- (ii) New York Times Co. v. Sullivan, 376 U.S. 254; 280 (1964).
- (iii) Miller v. News Syndicate Co., 445 F.2d 356 (2d Cir. 1971).

Thus, actual malice is a legal term which should not be confused with the dictionary definition of malice -- that is, ill will or personal spite. You may consider evidence of defendants' motives in deciding whether their statements were made with actual malice, but evidence of ill will, bias, spite or prejudice, standing alone, is an impermissible basis for finding actual malice. Similarly, the absence of ill will -- as shown, for example, by the publication by the Times of articles by the plaintiffs setting forth their position on the DDT public debate -- may also be considered by you in determining whether the Times acted with actual malice in publishing its article.

- (i) Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 281 (1974).

- (ii) Beckley Newspapers, Inc. v. Hanks, 389 U.S. 81, 82 (1967).
- (iii) Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

I repeat: actual malice is a special state of mind different from the dictionary definition of malice. Actual malice means that defendants published the statements complained about in this case, either knowing they were false, or with reckless disregard of their truth -- which means actually entertaining serious doubts about whether or not they were true.

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 10

In deliberating upon whether the New York Times article complained of was published with actual malice, you may consider all the evidence concerning the acts and conduct of the Times and Mr. Devlin which relate to that publication. You may find actual malice on the basis of direct evidence or you may infer it from a chain of circumstances, but you may not return a verdict for plaintiffs unless you find that the ultimate fact of actual malice is convincingly clear from all the testimony and evidence introduced in the case.

- (i) Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-58 (1967).
- (ii) Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

In deciding whether plaintiffs have met their burden of establishing actual malice by clear and convincing evidence, it is irrelevant whether you yourselves believe that the New York Times should have known that the statements complained of by the plaintiffs were false. Rather, evidence that the Times or Mr. Devlin actually knew that the publication was false or had serious doubts as to its truth is required. Unless you are persuaded by clear and convincing evidence that the Times or Mr. Devlin actually had such knowledge or doubts, you may not find against the Times.

Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975).

As I have said, the evidence of actual malice must be convincingly clear. Although plaintiffs need prove the other elements of their claim only by a preponderance or a greater part of the evidence, that is not enough for actual malice. The burden is on the plaintiffs to prove actual malice by clear and convincing evidence. Thus, even if you believe that the New York Times article complained about may have been published with actual malice, you must find for the Times unless in your judgment the evidence of actual malice on the part of the Times is convincingly clear.

Beckley Newspapers Corp. v. Hanks, 389
U.S. 81, 83-85 (1967).

[Character and Content of
Statement not relevant to
actual malice]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 11

However serious, injurious or objectionable you may consider the statements complained about by plaintiffs to be, this is irrelevant to your determination as to actual malice. The "character and content" of a publication are an "impermissible evidentiary basis for a finding of actual malice."

Washington Post Co. v. Keogh, 365 F.2d
965, 969 (D.C. Cir. 1966) (citing
New York Times Co. v. Sullivan), cert.
denied, 385 U.S. 1011 (1967).

Under the special rules which govern this case -- because of the constitutional protection given to published reports on persons who have become public figures in the course of debate on an important issue to our society -- even "the most repulsive speech enjoys immunity provided it falls short of [speech published with actual malice]."

- (i) Linn v. Plant Guard Workers, 383 U.S. 53,
63 (1966).
- (ii) See also Greenbelt Cooperative Publishing
Association, Inc. v. Bresler, 298 U.S. 6,
10 (1970).

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 12

If you find that the New York Times article at issue in this case was a substantially accurate report of information supplied by the Audubon Society and Mr. Arbib, and you further find that the Times could reasonably have considered the Audubon Society and Mr. Arbib to be reliable sources, then you must return a verdict for the New York Times Company. A newspaper is entitled to rely upon outside sources of information without independent verification unless those sources have a low community assessment as to trustworthiness, or unless those sources are persistently inaccurate or for some other reason they are unworthy of belief. Even if you find that the Times article complained of by plaintiffs was an inaccurate report of the information supplied by the Audubon Society and Mr. Arbib, you must return a verdict for the Times unless you find that this inaccuracy was due to actual malice, that is, that the Times reporter, John Devlin, deliberately distorted the information he received, or drafted his story despite actually having serious doubts whether the text as he wrote it actually reported what he had read in the Audubon Society publication, American Birds, and what he had been told on the telephone by Mr. Arbib.

- (i) Time, Inc. v. Pape, 401 U.S. 279, 290 (1971).
- (ii) St. Amant v. Thompson, 390 U.S. 727, 733 (1968).
- (iii) Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1027-29 (5th Cir. 1975).
- (iv) Medina v. Time, Inc., 439 F.2d 1129, 1130 (1st Cir. 1971).

- (v) Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).
- (vi) New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).
- (vii) Washington Post Co. v. Keogh, 365 F.2d 965, 971 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967).
- (viii) Buchanan v. Associated Press, 398 F.Supp. 1196, 1205 (D.D.C. 1975).

[Negligence is not Actual
Malice]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 13

If a news article in a case such as this contains false statements because of some mistake or negligence on the part of the Times, as a matter of law that is not enough to make it liable for the false publication. If, therefore, you find that the Times reporter, John Devlin, was mistaken in his impression of what Mr. Arbib told him on the telephone, such a mistake, standing alone, would be an impermissible basis for finding actual malice. You may infer actual malice against The New York Times Company only if in your judgment Mr. Devlin deliberately falsified the information supplied him by Mr. Arbib or published it despite actually having serious doubts as to whether his story truthfully recorded the information supplied by Mr. Arbib. Negligence in making a publication is not the same thing as publishing with knowledge of falsity or despite serious doubts as to truth. The test is not what a reasonably prudent man might or would have published or what a reasonable man would have investigated before publishing. For the Times to be responsible there must be clear and convincing evidence to prove that the Times knew the article was false or that the Times actually entertained serious doubts as to the truth of the statements it published.

- (i) Time, Inc. v. Pape, 401 U.S. 279, 290 (1971).
- (ii) St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
- (iii) Time, Inc. v. Hill, 385 U.S. 374, 389 (1966).

(iv) New York Times Co. v. Sullivan, 376 U.S. 254,
288 (1964).

(v) Washington Post Co. v. Keogh, 365 F.2d 965,
971, cert. denied, 385 U.S. 1011 (1967).

[No Need to Re-Investigate]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 14

A newspaper, magazine, news agency or other publication is not required to check, re-investigate or verify a report it receives unless it knows the report is false or it entertains serious doubts as to its truth. If the publication concerns a public matter such as this, the defendant may transmit the report without checking or verifying the report, and the Times may not be held liable even if the publication later proves false unless it is proved that the Times knew the report was false and still went ahead with the story, or that it actually had serious doubts about the report's truth and still printed the story.

- (i) New York Times Co. v. Sullivan, 376 U.S. 254, 387 (1954).
- (ii) St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
- (iii) Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85 (1967).
- (iv) Medina v. Time, Inc., 439 F.2d 1129, 1130 (1st Cir. 1971).
- (v) Washington Post Co. v. Keogh, 365 F.2d 965, 972 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967).

[Reply Language]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 15

Evidence has been introduced to the effect that the statements of which plaintiffs complain were uttered in reply to similar statements made by and concerning some of the defendants in this case. If you find that they were, you should return a verdict in favor of those defendants because the law allows a person who is called a name by another to respond in like manner.

- (i) Reynolds v. Pegler, 223 F.2d 429, 433 (2d Cir.) (interpreting New York law), cert. denied, 350 U.S. 846 (1955).
- (ii) Fowler v. New York Herald Co., 184 App.Div. 608, 611, 172 N.Y.S. 423 (1st Dep't 1918).
- (iii) Collier v. Postum Cereal Co., 150 App.Div. 169, 178-80, 133 N.Y.S. 852 (1st Dep't 1912).

In such circumstances, the law also allows a newspaper to print the responsive language without itself being liable in damages.

Preston v. Hobbs, 161 App.Div. 363, 365-66, 146 N.Y.S. 375 (1st Dep't 1914).

[Damages - When to Consider]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 16

We have come to a consideration of the amount of judgment, if any, to be awarded. This issue may not be considered unless you find that one or more of the plaintiffs has established all the elements of his claim that I have outlined for you. To review, if you find that one or more of the plaintiffs has carried his burden of proving by a preponderance of the evidence that statements made by one or more of the defendants referred to him, libeled him and were false, and carried his additional heavier burden of proving by clear and convincing evidence that the statements were made with actual malice -- and only if you so find -- only then may you calculate the amount of damages to be awarded to that plaintiff.

[Separate Findings as to
Damages]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 17

If you reach the issue of damages, you are to decide the issue separately as to each plaintiff and each defendant. As I have previously set forth for you, each of the parties to this lawsuit is entitled to have his rights fully vindicated by you and you are to bear that in mind with respect to damages, just as you are with respect to liability.

[Claimed Damages and
Judge's Opinion]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 18

The amount of damages claimed by plaintiffs in their complaint is no evidence or indication of the amount of damages, if any, sustained by them, and you should give no consideration to the amount claimed in their complaint. The sole function of the figure named in the complaint is to place a maximum limit upon the amount of damages plaintiffs could recover.

In instructing you as to the rules of law which govern you in your consideration of the question of damages, if you come to consideration of that issue, you should understand that I am not expressing any opinion as to whether damages should or should not be allowed. This is a matter solely for your determination under the rules of law as I have given them to you.

[Special Damages;
Nominal Damages]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 19

The Court instructs the jury that if you reach the issue of damages, you may award a judgment to compensate any one or more of the plaintiffs for actual injury suffered as a result of the statements complained about. The burden rests on each plaintiff to prove actual damage or injury by a preponderance of the evidence. Actual damages include any out-of-pocket loss, impairment of reputation and standing in the community, personal humiliation and mental suffering. Any award of actual damages must be supported by competent evidence of such damages. Such evidence may include among other things the totality of the circumstances under which the statements complained of were issued. That is to say -- if there has been considerable exchange of insults, the amount of injury from any one insult must be viewed in light of such exchange. If you find that any plaintiff is entitled to an award of actual damages because he has proven all the essential elements of his claim and has further proven that he suffered actual harm, then your award of actual damages must only compensate him commensurate with his loss or injury and no more.

You may not award plaintiffs damages for injury which may have occurred to them, but not as a result of the statements complained about in this case. Obviously, no defendant is responsible for damages which plaintiffs may have suffered but which were due to causes other than the statements complained about. For example, any damage to reputation suffered by any

of these plaintiffs as a result of other exchanges or debates by other parties in the DDT controversy may not, of course, be attributed by you to these defendants. Nor may you attribute to defendants any damages suffered by reason of publication by others of material of and concerning plaintiffs, if such publications were not actually by the defendants.

Gertz v. Robert Welch, Inc., 418 U.S.
323, 349-50 (1974).

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 20

The Court instructs the jury that no damages of any kind may be supposed or presumed to have occurred. As I have said, any plaintiff, if entitled to damages because he has proven all the essential elements of his claim, is entitled only to such actual damages as he proves by a preponderance of the evidence. You may not speculate as to such damages and you may not guess, imply or presume that any such damages have occurred. No award may be given that is more than actual injury proved to have occurred by competent evidence. Unless such damage is so proven to exist, then it is your sworn duty to find that no damages have occurred or that only nominal damages have occurred.

Gertz v. Robert Welch, Inc., 418 U.S.
323, 349-50 (1974).

If you find that plaintiffs have proven all elements of their libel claim but have failed to show by a preponderance of the evidence actual injury resulting from the libel, then your verdict shall be for no damages or merely nominal damages. Nominal damages are token damages -- in the amount, for instance, of \$1.00 -- which you may award if you feel that plaintiffs are entitled to recognition of the fact that they may have proven their claim, but have not suffered any injury as a result of the statements they have complained about.

Buckley v. Littell, 394 F.Supp. 918, 944-45
(S.D.N.Y. 1975).

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[No Punitive Damages]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 21

Punitive damages are not allowable in this case and you may not award any damages against the defendant as punishment or as a deterrent for the future.

- (i) Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).
- (ii) Maheu v. Hughes Tool Co., 384 F.Supp. 166, 169-74 (C.D. Cal. 1974).
- (iii) Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (1974).

[Punitive Damages]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 22

[IN THE EVENT THE COURT DECLINES TO GIVE THE PRECEDING REQUESTED INSTRUCTION, THIS DEFENDANT WILL REQUEST THE COURT TO GIVE THE FOLLOWING INSTRUCTION.]

Damages designed to punish a defendant or as a deterrent for the future are only allowable in a case such as this upon proof of willfully malicious or wanton conduct, desire to injure the plaintiffs, ill will, spite, personal animosity or the like. Since no such proof has been introduced with respect to the defendant Times, I direct you not to award any punitive damages against that defendant.

- (i) Cantrell v. Forest City Publishing Co.,
419 U.S. 245, 251-54 (1974).
- (ii) Toomey v. Farley, 2 N.Y.2d 71, 83, 138
N.E.2d 221, 156 N.Y.S.2d 840 (1956).
- (iii) Faulk v. Aware, 19 App.Div.2d 464, 471,
244 N.Y.S.2d 259 (1st Dep't 1963),
aff'd, 14 N.Y.2d 899, 200 N.E.2d 778,
252 N.Y.S.2d 95, modified on other
grounds, 14 N.Y.2d 954, 202 N.E.2d
372, 253 N.Y.S.2d 990, cert. denied,
380 U.S. 916 (1964).
- (iv) Gordon v. Nationwide Mutual Insurance Co.,
62 Misc.2d 689, 693, 309 N.Y.S.2d 420 (Sup.
Ct. 1970), aff'd, 37 A.D.2d 265, 323 N.Y.S.2d
550 (2d Dep't 1971), rev'd on other grounds,
30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d
601, cert. denied, 410 U.S. 942 (1972).

[Objections and Rulings]

DEFENDANT THE NEW YORK TIMES COMPANY'S
REQUESTED INSTRUCTION NO. 23

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or his client because objections are made.

By allowing testimony or other evidence to be introduced over the objection of an attorney, the court does not indicate an opinion as to the truth, weight or effect of such evidence. It merely rules on the legal question as to whether the evidence being offered may be presented to the jury for its consideration.

When the court has sustained an objection to a question addressed to a witness, the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if he had been permitted to answer any question.

Devitt and Blackmar, Federal Jury Practice and Instructions § 10.11.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

73 Civ. 1927 (CMM)

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

JURY INSTRUCTIONS
REQUESTED BY DEFEND-
ANTS NATIONAL AUDUBON
S. ARBIB, JR., ROLAND
C. CLEMENT AND ELVIS
J. STAHR, JR.

Defendants.

-----x
In the event that the claims for relief of plaintiffs herein are permitted to go to the jury for determination as against defendants, NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ROLAND C. CLEMENT and ELVIS J. STAHR, JR. ("The Audubon Defendants"), said defendants respectfully request that the Court instruct the jury as follows:

1. Nature of Action. Insofar as the plaintiffs claim to have been libeled by The Audubon Defendants, three libels are claimed to have been made.

(a) The first is the Foreword to the April, 1972 edition of "American Birds", a publication of the National Audubon Society, Inc. in collaboration with the U. S. Fish and Wildlife Service, which Foreword was written by the editor of "American Birds", Mr. Robert S. Arbib, Jr., who is sued in his individual capacity in this case.

(b) The second alleged libel of the plaintiffs

which they seek to charge The Audubon Defendants with is the article which appeared in the August 14, 1972 issue of The New York Times under the by-line of John Devlin, which article deals with the Foreword to the "American Birds" April, 1972 edition, mentions the plaintiffs' names and was published after The New York Times reporter Mr. Devlin had spoken over the telephone with Mr. Arbib.

(c) The third alleged libel which plaintiffs charge The Audubon Defendants with is a letter on the National Audubon Society letterhead dated August 14, 1972, which the evidence has indicated was written by Mr. Roland C. Clement, a Vice President of the National Audubon Society Inc., who is also sued as a defendant in his individual capacity in this case and bears the indication that it was signed for Mr. Robert S. Arbib, Jr. by Mr. Clement after telephone consultation.

2. The Foreword To The April, 1972 Edition of "American Birds" Appeared In That Edition In Which The 72nd Annual Christmas Bird Count Conducted Under the Auspices Of The National Audubon Society Was Reported.

Among other things, that Foreword, which mentioned no names, those of plaintiffs or otherwise, contained the following statements:

"We are well aware that segments of the pesticide industry and certain paid 'Scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species

high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

"The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

"With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of not more birds, but more birders. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie or is parroting something he knows little about."

The Foreword to "American Birds" is not libelous of the plaintiffs, or any of them, or any ascertainable person. [It is fundamental that "where a defamatory publication affects a class of persons, no member of that class can maintain an action therefor unless it is applicable to every member of the class or is specifically applicable to a particular member." 53 Corpus Juris Secundum, Section II, p. 55.

In Cohn v. Brecker, 20 Misc. 2d 329 (Sup. Ct. N.Y. Co. 1959) an employer who had discovered money to be missing spoke to three employees who had access to it and stated (while looking at the plaintiff): "One of you is a crook." In dismissing the complaint, the Court stated:

"Here the words refer to one not specified of a group of persons. Whereas it is essential that the 'defamatory words must refer to some ascertained or ascertainable person and that person must be the plaintiff ... So, if the words reflect impartially on either A. or B., or on some one of a certain number or class, and there is nothing to show which one was

meant, no one can sue.' Feely v. Vitagraph Co., 184 App. Div. 527, 528."

In Vogel v. Hearst Corporation, 116 N.Y.S. 2d 905 (Sup. Ct. Kings) the picture of plaintiff, a young girl not otherwise identified, appeared accompanying a magazine article entitled "Can Marriage Be Taught?" with captions including "How Far Dare An Engaged Girl Go?" She alleged that the article had ruined her good name and implied that she had loose standards, but her complaint was dismissed on the ground that the words of the article reflected on no ascertainable person.

Court of Appeals decisions to the same effect are: Hays v. American Defense Society, 252 N.Y. 266, 274-6 (1929) (pamphlet calling certain directors of an organization of which plaintiff was a member, reds and radicals held not of and concerning plaintiff); and Julian v. American Business Consultants, Inc., 2 N.Y. 2d 1, 14-18 (1956).]

3. The August 14, 1972 New York Times Article.

After one or more telephone conversations with Mr. Arbib and after telephone conversations with plaintiffs JUKES and WHITE-STEVENSON, The New York Times reporter, John Devlin, wrote the article which was published in the August 14, 1972 edition of The New York Times. That article reads as follows:

"PESTICIDE SPOKESMEN ACCUSED OF 'LYING ON HIGHER BIRD COUNT. By John Devlin. Segments of the pesticide industry and certain 'scientist-spokemen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

"The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

"He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply 'more birders' who go out on the annual counts and thus increase the size of the totals reported.

ACCUSED MEN NAMED

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner, Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

"Not all of the men could be reached for comment but those who could be ridiculed the accusations as 'emotional,' 'hysterical,' and unfounded, and Dr. Spencer said they were 'almost libelous.'

"We are all well aware,' Mr. Arbib wrote, 'that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other nondegradable hydro-carbon pesticides.

'SERIES DECLINES' FOUND

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and disheaters, are suffering serious declines in numbers as a direct result of pesticide contaminations; there is now abundant evidence to prove this.'

"He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to 'reiterate what we are seeing is not more birds but more birders.

"Anytime you hear a 'scientist say the opposite, 'he continued, 'you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.'"

No one at The New York Times, other than Mr. Davlin, spoke with any one at Audubon concerning the

article prior to its publication.

The headline to The New York Times article reading "Pesticide spokesman accused of 'lying' on higher bird count" was not written by Mr. Devlin but was instead written by some presently unknown editorial employee of The New York Times. Mr. Devlin's article was prepared by him in several drafts which have been placed in evidence. Mr. Devlin and Mr. Arbib agree that Mr. Arbib communicated to Mr. Devlin the plaintiffs' names.

Mr. Arbib has testified that he did so reluctantly and with admonition that under no circumstances was the National Audubon Society to be portrayed as contending that the named individuals, including the three plaintiffs, were lying, and that Mr. Arbib's position was strictly that these scientists had misconstrued Audubon's bird count data in the pesticide controversy.

Mr. Devlin agreed that Mr. Arbib was reluctant to name names, but has testified that Mr. Arbib gave him the names as the persons referred to in the Foreword to the April, 1972 edition of "American Birds".

If you accept Mr. Arbib's account of the telephone information communicated to Mr. Devlin to be correct, then Mr. Arbib and National Audubon Society, Inc. cannot be held by you to be responsible for The New York Times article. If you find that Mr. Arbib gave Mr. Devlin the plaintiffs' names as the persons referred to in the Foreword to the April, 1972 edition of "American Birds" and no more, then, too, the Audubon Defendants may not be charged with responsibility for the August 14, 1972 article which appeared in The New York Times.

Only if you find that Mr. Arbib gave the names of these plaintiffs to Mr. Devlin with knowledge that the same would be published and in the manner that they in fact were published by The Times, and only if you also find that the exact words used by Mr. Arbib in his conversations with Mr. Devlin were employed without any independent modifications, deletions or additions by Mr. Devlin and The New York Times editorial staff, can you consider The New York Times article to have been the act of The Audubon Defendants.

In such case, namely, that you consider The New York Times article of August 14, 1972 to have been a mere repetition or republication of statements made by Mr. Arbib, you must still consider whether those statements were such as to hold plaintiffs up to disgrace and were made with actual malice as will be discussed shortly. [See Schoepflin v. Coffey, 162 N.Y. 12, 17 (1900).

"It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person injured, and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander or libel. (Newall on Defamation, 245; Moak's Underhill on Torts, 145; M'Gregor v. Thwaites, 3 B. & C. 35.) The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. (Ward v. Weeks, 7 Bing. 211; Olmsted v. Brown, 12 Barb. 657.) The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and, therefore, the loss resulting from such repetition is not generally attributable to the first publisher. This rule

is based upon the principal that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander. (Bassell v. Elmore, 48 N.Y. 564; Fowles v. Bowen, 40 N.Y. 20; Terwilliger v. Wands, 17 N.Y. 57, 58; Laidlaw v. Sage, 158 N.Y. 73."

4. The August 14, 1972 Letter From National Audubon Society, Inc. To The Editor Of The New York Times.

The evidence is that on the day The New York Times article appeared, Mr. Roland C. Clement wrote and typed a letter to the editor of The New York Times, which read as follows:

"Editor
New York Times
229 West 43d Street
New York, New York

Dear Sir:

"Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

"It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have 'better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.'

"This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

"Nor do we like to call people liars, but those who have most consistently misused our data--Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug--certainly have had time to learn from our patient explanations of their misinterpretations of our data

over the several years of the DDT controversy.

Sincerely,

(Signed for Arbib by RCC after telephone
consultation; Arbib in N.Dak. at AOU)

Robert S. Arbib, Jr."

Mr. Clement's letter was not printed in The New York Times at any time. A copy of it was sent by an Audubon employee to DR. JUKES some time later.

5. Definition Of Libel. A libel is a false publication in writing which tends to disgrace or discredit a person in the community. If you find Mr. Clement's letter of August 14, 1972, or The New York Times article of August 14, 1972 did not bring these particular plaintiffs into disgrace or discredit them in the community, your verdict will be for The Audubon Defendants. If you find that the letter and article did bring these particular plaintiffs into disgrace or discredit them in the community, but was commonly understood to charge plaintiffs with only a single instance of ignorance, mistake or impropriety, your verdict will be for The Audubon Defendants, unless you find that the letter written by Mr. Clement or the article in The New York Times (if and only if the language of that article was procured to be published in The Times by Mr. Arbib or Mr. Clement), were a substantial factor in causing financial losses to plaintiffs. If you find that the letter and article in The New York Times did bring plaintiffs into disgrace or discredit in the community, and charge them with general incompetence, lack of character, or total disregard of ethics in their profession, and if you find

in such case that The Audubon Defendants were motivated by actual malice toward these plaintiffs, then your verdict will be for the plaintiffs. [Adapted from New York Pattern Jury Instructions PJI 3:24, Vol. 2, Committee on Pattern Jury Instructions, Association of Supreme Court Justices].

6. Libel In Privileged Situations. The interests of the public in the full and free discussion of all aspects of matters of public interest as protected by the First Amendment to our Constitution are such that where, as in this case, there is involved and at issue a question of considerable public concern, namely, the effect of DDT and related pesticides upon the environment and upon North American bird life, and where, as is the case here, the plaintiffs have become public figures in connection with that controversy by injecting themselves into the discussion with writings and speeches, it is not enough for the plaintiffs to show that The Audubon Defendants have made false statements of and concerning these particular plaintiffs which hold the plaintiffs up to disgrace and discredit in the community.

Plaintiffs here must prove by clear and convincing evidence -- this is more than a mere preponderance of the evidence -- that that which Mr. Arbib said to Mr. Devlin over the telephone about these plaintiffs was said with actual malice, or that what Mr. Clement wrote to the editor of The New York Times was written with actual malice.

A publication is made with "actual malice" in this connection if it is made with knowledge that it is false or with reckless disregard of whether it is false

or not. There must be clear and convincing evidence that Mr. Arbib or Mr. Clement themselves entertained serious doubts as to the truth of what they said or wrote.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968);

New York Times v. Sullivan, 376 U.S. 254 (1964);

Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974). It is not actual malice for a party with one point of view on a public question in controversy to seek to discredit the views of those on the other side. General hostility does not constitute actual malice. Garrison v. Louisiana, 379 U.S. 64, 73 (1964); Greenbelt Co-Op Pub. Ass'n. v. Bressler, 398 U.S. 6, 12 (1970).

7. Damages.

(a) Compensatory - My charge to you on the law of damages must not be taken as a suggestion that you should find for plaintiffs. It is for you to decide on the evidence presented and the rules of law I have given you whether plaintiffs are entitled to any recovery from The Audubon Defendants. If you decide they are not entitled to recover, you need go no further, and your verdict will be for The Audubon Defendants.

If you decide that plaintiffs are entitled to recover from The Audubon Defendants, compensatory damages consist of any losses or reductions in earnings sustained by the plaintiffs shown to have been caused by The Audubon Defendants. [The foregoing instruction is based upon the view that The Audubon Defendants cannot, as a matter of law, be regarded as having published a libel per se of and concerning plaintiffs. It is modeled on the

New York Pattern Jury Instruction, supra, PJI 3:371;

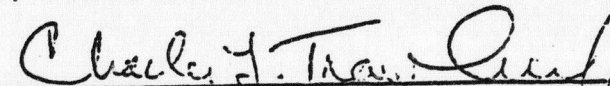
(b) Punitive Damages - Plaintiffs request punitive damages in this case. Punitive damages are allowed to punish a defendant who has acted maliciously and to discourage others from the commission of similar acts. No punitive damages can be awarded if there is no malice on the part of the defendants. If you find that there was such malice on their part, you may, but are not required to, award plaintiffs punitive damages.

Plaintiffs have the burden of proving actual malice by clear and convincing evidence. If you find that the Audubon defendants did not act with deliberate intent to injure the plaintiffs, or did not act in reckless disregard of the truth and its effect upon the plaintiffs, you may not make any award against the Audubon defendants for punitive damages. You may take into account on the question of compensatory or punitive damages or liability the heated nature of the controversy and the types of statements which have been published of and concerning the Audubon defendants by the plaintiffs as affecting the state of mind of the Audubon defendants.

Respectfully yours,

GIFFORD, WOODY, CARTER & HAYS
CROWE, MCCOY, AGOGLIA, CONGDON & ZWEIBEL

By



A Member of The Firm of
GIFFORD, WOODY, CARTER & HAYS
Attorneys for Defendants, National
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Arbib, Jr., Roland C. Clement and
Elvis J. Stahr, Jr.
14 Wall Street
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(212) 349-7400

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al :

Plaintiffs :

-against- :

NATIONAL AUDUBON SOCIETY, INC. :
THE NEW YORK TIMES COMPANY, INC. :
et al :

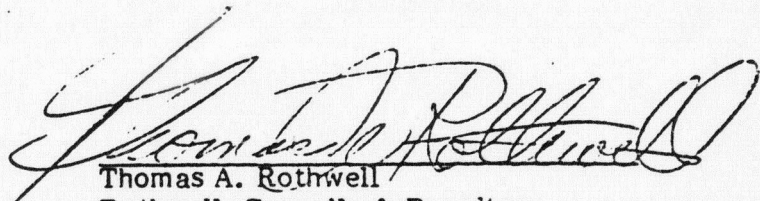
Defendants :

73 Civ. 1727
(CMM)

6/1/76 BS
no entries

PLAINTIFFS' REQUESTED
JURY INSTRUCTIONS

The Requested Jury Instructions of plaintiffs are submitted herewith pursuant to the direction of the Court by letter dated April 19, 1976. Due to the inclusion of certain material in the Pre-Trial Order, especially defendants' listing of exhibits, witnesses and triable issues, plaintiffs respectfully request the leave of Court to submit additional proposed charges relating to such issues should circumstances so require.



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Dated: May 29, 1976
Washington, D.C.

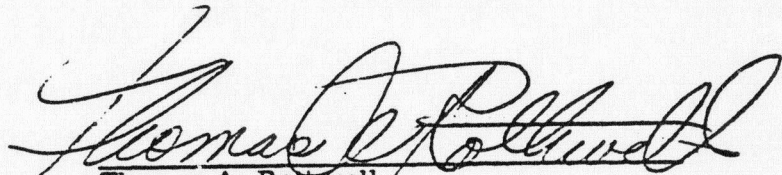
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:		JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 1

Libel is the publication of words, pictures or symbols which impute to a person a crime, or disgrace, dishonor or immoral conduct or otherwise injures the private character in the minds of a considerable and respectful class in the community. One who publishes a libel is liable in damages to the person so injured unless the libel be a matter which is privileged or unless the publication of the libel is true.

Peck v. Tribune Co., 214 U.S. 185



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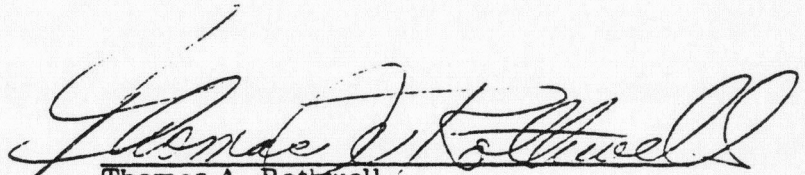
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 2

To constitute a libel in this case, the publications complained of must tend to expose a person to hatred, contempt or aversion or to induce an unsavory opinion of him in a substantial number of a community.

Mencher v. Chesley, 297 N.Y. 94



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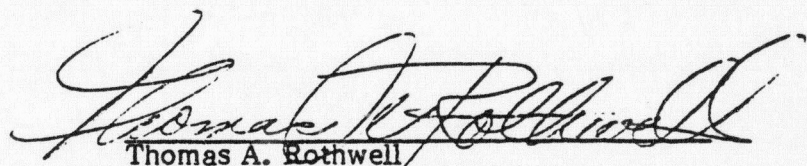
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
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THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 3

In passing on the question as to whether the publications in this case were libelous per se, you must construe the articles in question as a whole and the words and phrases must be considered in context. Words alleged to be libelous are to be taken in their natural meaning and construed as persons generally understand them according to their ordinary meaning. The articles are libelous if they would tend to cause members of the plaintiffs' community to shun or avoid them and hold them up to contempt and scorn.

Sidney v. MacFaddin Newspaper Publishing Corp., 242 N.Y. 208; Tracy v. Newsday, Inc., 5 N.Y.2d 234; Crane v. New York World Telegraph Corp., 308 N.Y. 470; John P. Robert, v. Troy Record Co., 31 AD.2d 574



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al :

Plaintiffs :

73 Civ. 1727
(CMM)

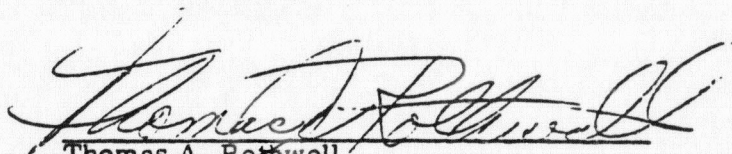
-against- :

NATIONAL AUDUBON SOCIETY, INC. :
THE NEW YORK TIMES COMPANY, INC. :
et alPLAINTIFFS' SUGGESTED
JURY INSTRUCTIONSDefendants :

PLAINTIFFS' JURY INSTRUCTION NO. 4

In considering the publication that is before you, you must consider the publication as a whole and determine the meaning of the publication and how it would be understood by ordinary readers from the entire context thereof, with all other factors and circumstances as shown by the evidence.

Washington Times Co. v. Hines, 5 F.2d 541



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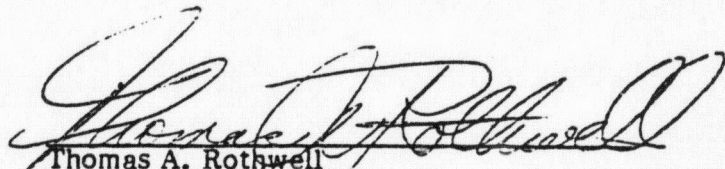
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 5

In appraising the defamatory nature of a headline to an article, the rule is that they must be read in the context of the entire article. The test to be applied is whether the article accompanying the headline would ordinarily be read with it. It is for the jury to decide whether by reason of the nature of the libelous headline and the accompanying defamatory article the headline may be appraised separately as a libelous publication.

Gambuzza v. Time, Inc., 18 AD.2d 351



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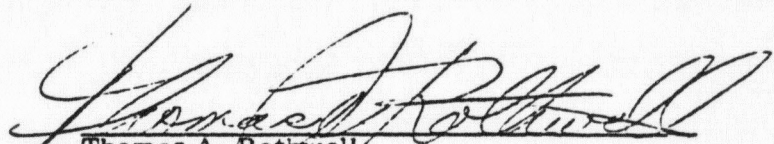
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
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-against-	:	
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THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 6

Where a publication is susceptible to two meanings, one of those which would be libelous and the other not, it is for you to say which of the two meanings would be attributed to it by whom it may be read. In reaching your decision, you may consider all of the circumstances surrounding the publication, including extraneous facts admitted in evidence.

Washington Post, Co. v. Chaloner, 250 U.S. 290


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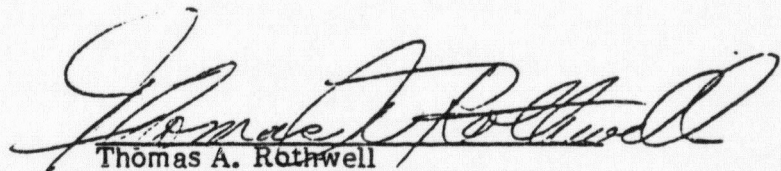
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
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THE NEW YORK TIMES COMPANY, INC.	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 7

The law utilizes a presumption, until the contrary appears, that every person has a good character and has done nothing to forfeit the good opinion of the community. The law regards a good reputation as a thing of value and that the publication that injures a good name is an injury for which damages may be recovered.

Washington Post, Co. v. Chaloner, 250 U.S. 290



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
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et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 8

Even in the area of political debate and discussion there must be a recognition at some point of the interest of the individual in protecting his reputation against libelous falsehood. This protection is afforded even to public officials and other public figures who have exposed themselves to the sharpest of public scrutiny and public criticism. For this reason, the rule has been adopted that the knowingly false statement and the false statement made with reckless disregard of their truth do not enjoy protection, even under the freedom of speech principle embodied in the Constitution. There is no absolute or unconditional privilege against libel in the realm of discussions involving public issues or public figures.

Garrison v. Louisiana, 379 U.S. 64; Goldwater v. Ginzberg, 414 F.2d 324 (2nd Cir. 1969);
Gertz v. Welch, 418 U.S. 323; Buckley v. Littel, 394 F.Supp. 918 (SDNY 1975)


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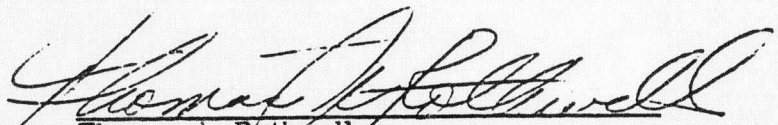
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
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THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 9

It is not an adequate defense for the defendant to merely reply by offering professions of good faith. These cannot prevail if the jury finds that the publishers allegations are so inherently improbable that only a reckless man would have put them into circulation. Such reckless publication may be taken by the jury as supporting a conclusion of actual malice.

St. Amant v. Thompson, 390 U.S. 727


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:		JURY INSTRUCTIONS
et al	:	
Defendants	:	

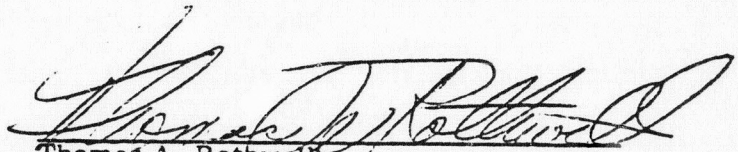
PLAINTIFFS' JURY INSTRUCTION NO. 10

A defendant in a defamation action, even one brought by a public figure, cannot automatically insure a favorable verdict from a jury merely by testifying that the defamation was published with the belief that the statements were true. The jury must decide whether the publication was indeed made in good faith. Professions of good faith will be unlike to prove persuasive, for example, where the statements are recklessly published, meaning that there are obvious reasons to doubt the truthfulness of the information that is the subject matter of the libel.

Although there is no duty to investigate, assuming that the source of the information is authoritative, when such investigation is in fact made, and such investigation discloses a substantial reason to doubt the accuracy of the report, then subsequent publication may be considered to be reckless, in the sense of without regard for the rights of others.

For the jury to conclude that any of the defendants are liable to plaintiffs, there must be sufficient persuasive evidence to permit your conclusion that the defendants, or any of them, entertained serious doubts as to the truth of the publication. To publish with such doubts shows reckless disregard for truth or falsity, and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727

A handwritten signature in dark ink, appearing to read "Thomas A. Rothwell", is written over the printed name.

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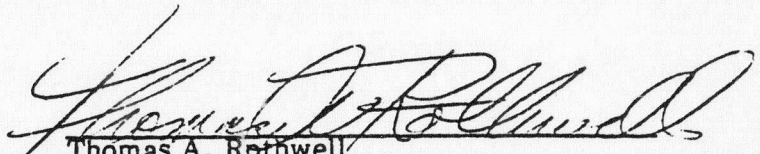
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 11

Reckless disregard of whether the matter published was false or not as defined by the courts does not refer to objective reasonably prudent man standard, the defendant must have proved to have subjectively entertained serious doubts as to the truth of his publication. The law requires a higher standard of proof in this regard than the usual preponderance of the evidence in this test. The question of whether it was true or false must be demonstrated by clear and convincing proof.

Aliotto v. Cowels Communications, Inc., 519 F.2d 777 (9th Cir. 1975)



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

184a

J. GORDON EDWARDS, Ph.D., et al :

Plaintiffs :

73 Civ. 1727
(CMM)

-against- :

NATIONAL AUDUBON SOCIETY, INC. :
THE NEW YORK TIMES COMPANY, INC. :
et al

PLAINTIFFS' SUGGESTED
JURY INSTRUCTIONS

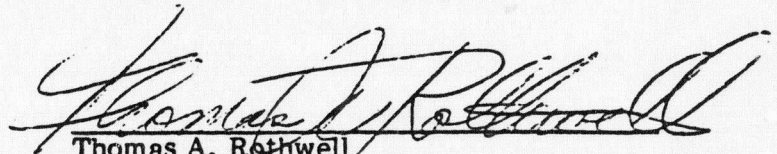
Defendants :

PLAINTIFFS' JURY INSTRUCTION NO. 12

The defendant in a libel and defamatory action brought by public figures cannot automatically insure a favorable verdict by a statement that he believed the statements were true. The jury must determine whether the publication was indeed made in good faith. There must be evidence for the jury to make the conclusion that the defendant entertained serious doubts as to the truth of the publication. Publishing with such doubts shows reckless disregard as to the truth or falsity and demonstrates actual malice.

Repetition of another's words does not release one from libel. If the repeater knows that the words are false or inherently improbable, or if there are obvious reasons to doubt the person quoted, or the veracity of his reports, one cannot fairly argue his good faith or liability by claiming that he is relying on the latter's statements, or observations are altered or taken out of context.

St. Amant v. Thompson, 390 U.S. 727 (1968); Goldwater v. Ginzberg, supra



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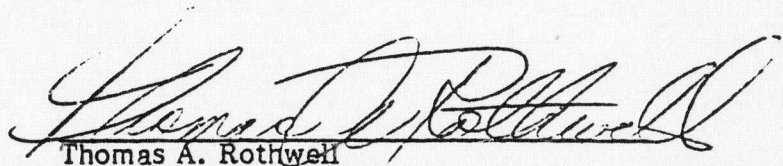
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION 13

It is no defense that in making defamatory statement the defendant merely repeated or quoted a statement made by another. It makes no difference whether a defamatory statement is originated by the defendant or merely repeated by him on the basis of a statement made to him. You are instructed as a matter of law that one who repeats another's defamatory statement is legally responsible unless the story is true, the repetition privileged, or plaintiff consented to the publication.

Pittsburgh Courier Pub. Co. v. Lubore, 200 F.2d 355



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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
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THE NEW YORK TIMES COMPANY, INC.:	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

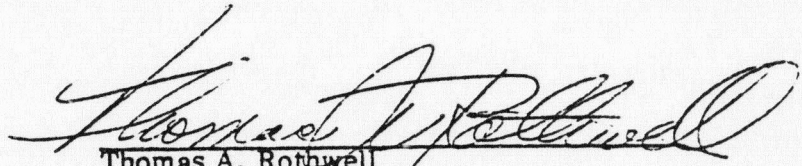
PLAINTIFFS' JURY INSTRUCTION NO. 14

The jury must apply the test as to damages that, in a case involving public figures, proof of knowing falsehood or reckless disregard of the truth is necessary. If this is established in your minds by the evidence, then you may award presumed and punitive damages to plaintiffs. For the purposes of this case, damages in the libel and defamation action may be both compensatory and punitive. In turn, compensatory damages may be awarded as nominal damages, general damages or special damages. There is no claim of special damages made by plaintiffs in this case. Special damages means actual damages such as a bill from a hospital representing part of plaintiff's costs for the injuries suffered.

General damages may be awarded where there is sufficient evidence presented to you to permit an inference of some general impairment to the plaintiff's reputation, or to his other interests.

Punitive damages may be awarded in this case should the jury find that the publication by any of the defendants were activated by a desire to harm plaintiffs or where the publication is so recklessly made so as to indicate a heedless disregard for the rights of others. The purpose of punitive damages is to assist in protecting the plaintiffs' reputations, and to protect against like abuse of other persons similiarly situated.

Buckley v. Littell, 394 F.Supp. 918 (SDNY 1975)

A handwritten signature in cursive script, appearing to read "Thomas A. Rothwell", written over a horizontal line.

Thomas A. Rothwell
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(202) 785-5025
Attorneys for Plaintiffs

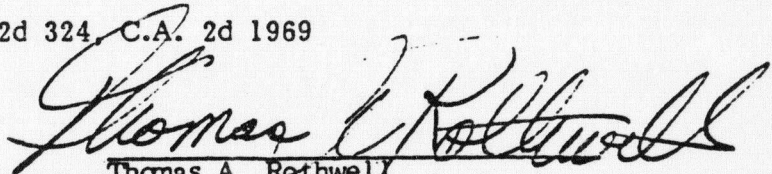
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al	:	
Plaintiffs	:	73 Civ. 1727 (CMM)
-against-	:	
NATIONAL AUDUBON SOCIETY, INC.	:	PLAINTIFFS' SUGGESTED
THE NEW YORK TIMES COMPANY, INC.	:	JURY INSTRUCTIONS
et al	:	
Defendants	:	

PLAINTIFFS' JURY INSTRUCTION NO. 15

It is appropriate under New York law for a jury to award to a plaintiff nominal compensatory damages and substantial punitive damages. This rule comes into operation when the evidence establishes to the satisfaction of the jury that the defendants were motivated by actual malice when they published the alleged defamatory statements or acted with reckless disregard as to whether such statements were true or false. A jury award of punitive damages against one who publishes falsehoods with actual malice serves two wholly legitimate purposes: 1) the protection of the libeled individual; and 2) the protection against like abuse of all other persons similarly situated.

Goldwater v. Ginzburg, 414 F. 2d 324, C.A. 2d 1969



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Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al :

Plaintiffs :

-against- :

NATIONAL AUDUBON SOCIETY, INC. :
THE NEW YORK TIMES COMPANY, INC. :
et al :

Defendants :

73 Civ. 1727
(CMM)

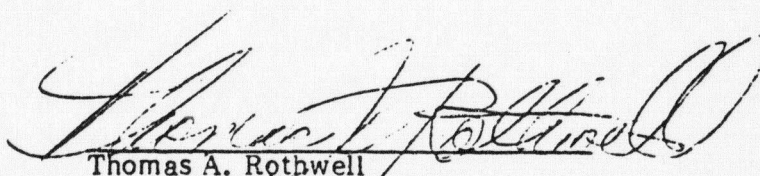
AFFIRMATION OF SERVICE

I certify that copies of the Plaintiffs' Requested Jury
Instructions were served upon defendants by depositing copies in the
United States mail, postage prepaid, on May 29, 1976, addressed as
follows:

MESSRS. GIFFORD, WOODY, CARTER & HAYS
14 Wall Street
New York, New York 10005

MESSRS. CAHILL, GORDON & REINDEL
80 Pine Street
New York, New York 10005

CROWE, McCOY, AGOGLIA & ZWEIBEL
80 East Old Country Road
Mineola, New York 11501


Thomas A. Rothwell

Dated: May 29, 1976

UNITED STATES DISTRICT COURT

190A

SOUTHERN DISTRICT OF NEW YORK

-----X

J. GORDON EDWARDS, Ph.D., :
THOMAS H. JUKES, Ph.D., :
ROBERT H. WHITE-STEVENSON, Ph.D., : 73 Civ. 1727

Plaintiffs, :

-against-

NOTICE OF MOTION AND
MOTION FOR JUDGMENT
N.O.V.

NATIONAL AUDUBON SOCIETY, INC., :
THE NEW YORK TIMES COMPANY, INC., :
ROBERT S. ARBIB, JR., : ORAL ARGUMENT REQUESTED
ROLAND C. CLEMENT, :
ELVIS J. STAHR, JR., :

Defendants. :

-----X

S I R S :

PLEASE TAKE NOTICE that upon the trial record and all trial exhibits herein, the annexed affidavit of Floyd Abrams, Esq., sworn to June 21, 1976 and the accompanying Memorandum in Support of Defendant's Motion for Judgment Notwithstanding the Verdict, defendant, The New York Times Company, Inc., by its attorneys, will move this Court in Room 2201 of the United States Court House, Foley Square, New York, New York, on July 1, 1976, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 50(b) of the Federal Rules of Civil Procedure granting defendant The New York Times Company, Inc. judgment notwithstanding the verdict; for the costs and disbursements of this action; and for such other

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and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 21, 1976

Yours, etc.,

CAHILL GORDON & REINDEL

By *[Signature]*

A Member of the Firm
Attorneys for Defendant,
The New York Times Company, Inc.
Office and P.O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

TO:

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Attorneys for Defendants
National Audubon Society, Inc.,
Robert S. Arbib, Jr., Roland C.
Clement, Elvis J. Stahr, Jr.
80 East Old Country Road
Mineola, N.Y. 11501

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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- - - - - x

J. GORDON EDWARDS, PH.D., :
THOMAS H. JUKES, Ph.D., and :
ROBERT H. WHITE-STEVENS, Ph.D., :

Plaintiffs, :

-against- :

AFFIDAVIT

NATIONAL AUDUBON SOCIETY, INC., :
THE NEW YORK TIMES COMPANY, INC., :
ROBERT S. ARBIB, JR., :
ROLAND C. CLEMENT, and :
ELVIS J. STAHR, Jr., :

73 Civ. 1727

Defendants. :

- - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FLOYD ABRAMS, being duly sworn, deposes and says:

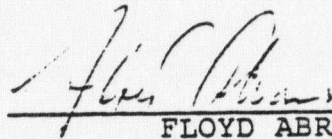
1. I am a member of the firm of Cahill Gordon & Reindel, attorneys for defendant, The New York Times Company, Inc. ("the Times"). I am fully familiar with all prior proceedings herein. This affidavit is submitted in support of the motion of the Times for judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

2. The basis of the motion for judgment notwithstanding the verdict is the absence of clear and convincing proof of actual malice by the Times with respect to the publication of its August 14, 1972 article at issue in the case. A motion for

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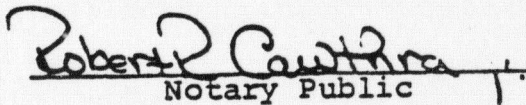
directed verdict on the same ground was made at the conclusion of plaintiffs' case (Tr. 405) and again after the submission of all evidence (Tr. 552). For the convenience of the Court, we annex to this affidavit copies of the "Foreword" to the April 1972 issue of American Birds published by the National Audubon Society, Inc.; the Times article; and the letter dated August 14, 1972 written by Mr. Roland Clement for the signature of Mr. Robert S. Arbib.

WHEREFORE, it is respectfully submitted that the motion of the Times for judgment notwithstanding the verdict should be granted.



FLOYD ABRAMS

Sworn to before me this
21st day of June, 1976


Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0603710
Qualified in New York County
Commission Expires March 30, 1977



AMERICAN BIRDS

incorporating Audubon Field Notes

APRIL 1972, VOLUME 26, NUMBER 2

Contents

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Foreword

With the publication of this issue of *American Birds*, the Seventy-second Christmas Bird Count is now history. New records were again set this year, with 963 counts, and 18,798 participants. With 231 species recorded in Canada, and 583 overall, record totals in this category were also chalked up. This year, just for curiosity's sake (since there is no real meaning to the statistic) a grand total of 64,584,702 individual birds was estimated, of which large numbers were waterfowl, Starlings and blackbirds.

We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in *AMERICAN BIRDS*) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders*. Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

The devoted reader will find much of topical interest in the pages of CBC's that follow; some of it highlighted

in the summary by our Christmas Count Editor, but much of it necessarily omitted for the sake of brevity. Notable incursions of Snowy Owl, Bohemian Waxwing, and all the "winter finches" were evident, especially of redpolls. It was a good year—if not the best ever—for Gyrfalcons, but Hawk Owls were conspicuously scarce. Southern and southwestern counts listed more late-lingers, especially warblers, than ever, thanks to a wet and warm autumn.

The dearth of coverage from large areas of northern Canada leaves vast gaps in our knowledge; we need observers in such frigid locales as Inuvik, Isachsen, Yellowknife, Churchill, Moosonee, Goose Bay, and other points north. There are, moreover, substantial gaps even in more populated areas. A look at the Index (back cover) will show which states and provinces are now neglected; one good count in the middle of nowhere would be far more informative than a score locked in deadly competition in adjacent and similar habitats, such as found around most metropolitan areas.

With the enormous growth in popularity of the CBC, we are fast reaching the capacity of this publication and its staff to cope. Something, quite soon, has got to give. Perhaps first to go will be counts close to others, but with inadequate coverage. Very little information of value can come from one person covering an area of 47+ square miles in one day. Actually, there should have been imposed long ago a minimum of 10 observers and 5 parties, even if this meant losing some old and faithful participants.

This coming year we will also try to cut the "fat" out of all current counts, including already-published count circle descriptions, irrelevant weather notes, and unnecessary "verification" notes. The new instructions (page 546) will give details. Perhaps contrarily, next year we are going to open, with some trepidation, the publication to CBC's from the West Indies and Central America (Mexico through Panama) reflecting our greater interest in bird study and conservation in these regions. This decision is against the better judgment of our retiring Editor, and is made with the strict proviso that accepted species names only be used. Accepted names are those used by Eisenmann, E.. *The species of Middle American birds*, Trans. Linn.

1952

Soc. N.Y., VII, 1955. Friedmann, H., L. Griscom and R. T. Moore, *Distributional Check-list of the Birds of Mexico*. Pac. Coast Avifauna 33., Cooper Ornith. Soc., Berkeley, Cal., 1957, or handbooks generally conforming to these works. The recent Mexican Field Guide by Irby Davis (Texas University Press, 1972) while of considerable merit, may not be used for nomenclature, since it differs radically from all others.

This coming year we would like one added bit of information that may be helpful in explaining winter incursions. Northern and mountain areas will be asked to note the condition of cone and berry crops: poor, fair, good, excellent (see instructions).

We do not believe that it is yet clear to all compilers that the very same count forms they return are used by typesetters to set this issue in type. Because these forms come in to us in hundreds of different personal writing and printing styles—some tiny, some neat, some sloppy, and some almost illegible—because it is a complicated form, with pages to turn, it is considered "difficult" copy, and takes longer (and costs more) than typewritten manuscript. Compilers who do not follow instructions to the letter add to our editing time and our typesetting costs. Faint pencil, blurred felt-tip pens, unacceptable abbreviations (i.e. R-sh. Hawk) out of-order species all slow the work. But if some of the lengthiest counts come in letter perfect, so can all.

Once again, a note on the participation fee. After annual explanations for years, we still hear the occasional "Why should I have to pay for my day's birding?" The reason is simple. Without the fee, there would be no funds to print the packet of forms each compiler gets, to mail them, to edit the returned counts, to publish the CBC issue, or to mail it. No fee—no Christmas Bird Count. Even with the \$18,798 received in participation fees this year, the Christmas Bird Count still represents a deficit operation for the National Audubon Society, and an actual subsidy to every participant. Some day, perhaps, an end to the fee will be possible: the quickest way would be for every subscriber to bring in a new subscriber!

One final milestone has been reached with this issue. Allan D. Cruickshank, the eternal youth, claims that he has reached the age of 65 and will retire at year's end. This is obviously a preposterous lie, since Allan is still chasing across marshes and mudflats with all the competitive zest he exhibited only yesterday as a 20-year old. Over the years he has contributed by example and exhortation, more than anyone to the mammoth growth of this annual spectacular, and to

say that he will be replaced by a team of regional Count editors is inaccurate in one sense: he cannot be replaced; it will take a team to do his work. He himself will be a member of that team as long as he desires, which should take us well into the next century. Meanwhile, in retirement, we wish him good birding, sharp pencils, and Cocoa on top once more!

Other members of the editorial staff for this issue include our Technical Editor, Chandler S. Robbins, our arbiter of high counts, Burt L. Monroe, Jr., a new compiler of Canadian high counts, Ross Anderson, of Nova Scotia, and our good right hand, whose many services were noted last year, Lois Heilbrun.

—Robert S. Arbib, Jr.



Imm. Bald Eagle, Oradell Reservoir, N.J. Seen on Hackensack-Ridgewood CBC, Dec. 18, 1971. Photo/Stephen E. Munz.

1962

N.Y. Times
8/14/72 p.33

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

By JOHN DEVLIN

"Segments of the pesticide industry and certain 'scientist-spokesmen' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT."

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Dorlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hys-

terical," and unfounded, and Dr. Spencer said they were "almost libelous."

"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides."

'Serious Declines' Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contaminations; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders."

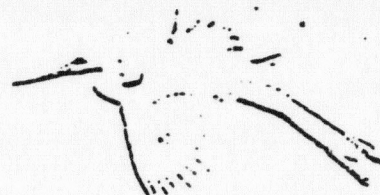
"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Servicemen Back Nixon

SAIGON, South Vietnam, Aug. 13 (AP) — The United Service Organization has reported that a straw poll of 1,051 American servicemen who visited its downtown club here from July 16 to 30 gave President Nixon 70 per cent of the votes and Senator George McGovern 16 per cent. Eleven per cent were undecided and a 3 per cent write-in vote went mostly to Gov. George C. Wallace of Alabama.

EDUCATION

1972



NATIONAL AUDUBON SOCIETY

950 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 532-3200 Cable: NATAUDUBON

August 14, 1972

Editor
New York Times
229 West 43d St.
New York, New York

Dear Sir:

Jack Devlin's punchy piece on the Audubon Christmas Bird Count summary from the April issue of AMERICAN BIRDS unfortunately leaves out the most important qualifications we attach to these counts.

It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders, who have "better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification."

----- This is why our counts, though they have many uses, are not a reliable clue to population changes from decade to decade. There is no way around this problem in interpretation because we do not know exactly how much the birder himself has been improved as an observer over the years.

Nor do we like to call people liars, but those who have most consistently misused our data--Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug--certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Sincerely,

(signed for Arbib by RCC after telephone consultation;
Arbib in N.Dak. at AOU)

Robert S. Arbib, Jr.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

Signed	
Revised	6/2/76
Docket	6/2/76
Diary	6/2/76
In Charge	6/2/76

: 73 Civ. 1727 (CM)

: NOTICE OF MOTION
BY DEFENDANT,
: ROLAND C. CLEMENT,
FOR JUDGMENT NOT-
: WITHSTANDING THE
VERDICTS

:

:

S I R S :

PLEASE TAKE NOTICE, that upon the testimony and exhibits received into evidence at the trial, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court on behalf of defendant, Roland C. Clement, before the Honorable Charles L. Metzner, in Room 2201, in the United States District Courthouse, Foley Square, New York, New York, on ^{July} June 1, 1976, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 50 of the Federal Rules of Civil Procedure.

(1) granting said defendant judgments notwithstanding the verdicts given in this cause on June 9, 1976, insofar as said verdicts determine said Roland C. Clement to have libeled plaintiffs, J. Gordon Edwards, Thomas M. Jukes and Robert H. White-Stevens, in the August 14, 1972, New York Times article, and award compensatory damages to said plaintiffs, and granting said defendant judgment dismissing the complaint of each of the plaintiffs insofar as it pertains to said Times Article upon the grounds that there is insufficient evidence to support the

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verdicts and said defendant is entitled to judgment as a matter of law.

Dated: New York, New York
June 18, 1976

GIFFORD, WOODY, CARTER & HAYS
CROWE, MCCOY, AGOGLIA, CONGDON & ZWEIBEL

By S/ CHARLES E. TREMBLAY

A Member of the Firm of
GIFFORD, WOODY, CARTER & HAYS
Attorneys for Defendants,
National Audubon Society, Inc.
Robert S. Arbib, Jr., Roland C.
Clement and Elvis J. Stahr, Jr.
Office & P. O. Address
14 Wall Street
New York, New York 10004
(212) 349-7400

TO:

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CAHILL, GORDON & REINDEL, ESQS.
Attorneys for Defendant
The New York Times Company, Inc.
80 Pine Street
New York, N. Y. 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al,

Plaintiffs

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC., et al,

Defendants

by	6/15/76
by	
by	
by	6/21/76
by	6/21/76
by	6/21/76
by	6/21/76

73 Civ. 1727
(CMM)

PLAINTIFFS' MOTION FOR JUDGMENT

Plaintiffs move the Court for a joint and several judgment against National Audubon Society, Roland Clement and the New York Times in the amount of \$20,000.00 in favor of plaintiff Thomas A. Jukes; in the amount of \$20,000.00 in favor of plaintiff Robert H. White-Stevens; in the amount of \$21,000.00 in favor of plaintiff J. Gordon Edwards; and, for a judgment against National Audubon Society and Roland Clement in the amount of \$1.00 in favor of each of the above plaintiffs.

On June 9, 1976, the jury returned a verdict against the New York Times and Roland Clement in the above amounts. It is submitted that said verdict of the jury under the circumstances was in law a verdict against National Audubon Society on the following grounds:

1) The jury was properly instructed by the Court that the Audubon Society was responsible for the acts of their officers and employees done within the scope of their employment.

2) The issue of respondeat superior was not in the case; counsel for Audubon, Mr. Trowbridge, had specifically disclaimed to the Court any reliance on such issue.

201a

3) There was not a scintilla of evidence in the record to suggest that defendant Clement was acting in the premises other than as an officer and employee of Audubon.

4) Counsel for Audubon did not urge or raise this issue in his opening to the Court and jury, nor during his summation.

5) Had this issue been raised at any time prior to the receiving of the jury verdict, plaintiffs would have been entitled to a directed verdict in their favor on the issue of respondent superior.

6) In the light of all the circumstances, the pleadings, the proof, the Court instruction, and as a matter of law plaintiffs are entitled to judgment as against defendant Audubon in the amounts as found by the jury.

Respectfully submitted,



Thomas A. Rothwell
ROTHWELL, CAPPELLO & BERNDTSON
1225 - 19th Street, N.W.
Washington, D.C. 20036
(202) 785-5025
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D., et al.,

Plaintiffs

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
et al.,

Defendants

PLAINTIFFS' MOTION FOR JUDGMENT

ROTHWELL, CAPPELLO & BERNDTSON
1225 - 19th Street, N.W.
Washington, D.C. 20036
(202) 785-5025
Attorneys for Plaintiffs

202a

Dec 8, 1976 This motion is
denied. Judgment shall be
entered according to
the verdict of the jury
so ordered.

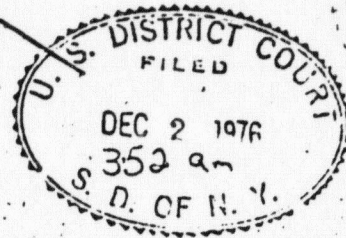
Charles W. Metzger

U. S. D. J.



O.P.I.N.I.O.N

10



J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

-against-

73 Civ. 1727
(CMM)

Defendants.

Rothwell, Cappello & Berndtson
Attorneys for Plaintiffs
1225 19th Street, N.W.
Washington, D.C. 20036

Cahill Gordon & Reindel
Attorneys for Defendant The New
York Times Company, Inc.
80 Pine Street
New York, N. Y. 10005

Floyd Abrams
Eugene R. Scheiman
Ruth D. MacNaughton
Of Counsel

[illegible]

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METZNER, D. J.:

Defendant The New York Times Company (the Times) moves for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs in this action. Fed. R. Civ. P. Rule 50(b).

This is a libel action in which the jury awarded compensatory damages, but denied punitive damages, in favor of each of the plaintiffs against the Times and defendant Roland Clement, a vice president of the National Audubon Society, Inc. (the Society). The jury also rendered a verdict in favor of defendants Robert S. Arbib, Jr. and the Society.

The basis for the motion is that the standard of liability created in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), has not been met by the evidence produced by these plaintiffs. That standard permits recovery only if the plaintiff proves "that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The background of this lawsuit starts with the appearance of the Foreword to the April 1972 issue of "American Birds," a magazine published by the Society. Despite its date, the magazine was not distributed until the first week of July, 1972. Sometime around the end

of July or the beginning of August, John Devlin, Sr., a reporter for the Times who has specialized in nature stories, read the issue and his attention was caught by statements made in the Foreword directed to the use of the Christmas bird count in connection with the DDT controversy that was raging in those days. The Foreword stated that it was "well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals . . . as proving that the bird life in North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides." The Foreword went on to state that: "This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons."

After stating what is supposed to be the truth regarding the bird count and its implications, this portion of the Foreword concludes:

"Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

On August 14, 1972, a two-column story appeared in the Times under a Devlin byline. The headline over the story read, "Pesticide Spokesmen Accused of 'Lying'"

on Higher Bird Count." According to the article, the accuser was Arbib, the editor of "American Birds." The story goes on to state that while the Foreword did not identify the alleged spokesmen accused of lying, Arbib furnished the reporter with the names of five persons intended to be covered by the accusation, three of whom are plaintiffs in this case. The Times story gave the five names with identifying information as to each. The three plaintiffs in this lawsuit are Dr. Robert H. White-Stevens, a professor of biology and chairman of the Bureau of Conservation at Rutgers University, Dr. Thomas H. Jukes, a professor of biochemistry at the University of California at Berkeley, and Dr. J. Gordon Edwards, a professor of entomology at San Jose State College. The other two persons named in the story were Dr. Norman E. Borlaug, a Nobel Prize winner, and Dr. Donald A. Spencer, a retired ecologist and now a private consultant.

The Times story relates that not all those named could be reached for comment, but that those who were reached ridiculed the accusations as "emotional" and "hysterical," with Dr. Spencer being quoted as saying they were "almost libelous." The story concludes with quotations from the Foreword, including those referred to above, as well as paraphrasing of other portions.

The case was submitted to the jury without objection on the assumption that the plaintiffs were public figures. The story is clearly libelous.

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976).

There is no doubt that the Times story accurately reported and correctly quoted from the Foreword in American Birds, although the headline was slightly off in accuracy. The jury found on credible evidence that the Times accurately reported the five names furnished by Arbib as being those referred to as liars in the Foreword.

The Times' position is that under these facts, the jury was not presented with clear and convincing proof that the article was published with actual malice and therefore could not have returned a verdict in favor of the plaintiffs. If this were all there is to the case, the court might be of a mind to grant defendant's motion. In fact, it might well have disposed of the litigation by granting the usual motion made at the end of the plaintiffs' case or at the end of the entire case. However, the events that transpired between the time Devlin read the Foreword and the publication of his story on August 14, 1972, require a denial of the motion.

In considering a motion for judgment notwithstanding the verdict, the court shall view the evidence

in the light most favorable to the plaintiffs.

O'Connor v. Pennsylvania R.R., 308 F.2d 911, 914 (2d Cir. 1962).

We have here a reporter of 25 years' experience who must have known from the outset that he was dealing with a libelous article. The Times has never contended that the story was not libelous. The reporter attended annual meetings of the Society, went on field trips, and had written several articles for the Society. He was not a novice as to the background of the story. Finally, his memory on the witness stand as to the events leading up to the publication of the story was abysmally poor and contradictory. He could not remember with any degree of accuracy to whom he spoke or the extent of the conversations.

The jury was fully justified in finding that while Arbib had furnished Devlin with the names, he had also cautioned against their use. This does not necessarily include a finding that Arbib had stated to Devlin that he was not calling the five persons liars. Devlin pressured Arbib for the names because he was of the opinion that this was newsworthy--the public ought to know which scientists were being called liars by the Society.

Devlin, with the names in hand, contacted Dr. White-Stevens on August 4 and read the Foreword to

208 a-1

him. They had a 45-minute telephone conversation which covered the whole range of the agricultural chemical business. The testimony shows that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used. Dr. White-Stevens furnished Devlin with the telephone numbers of the other four named by Arbib although Devlin already knew that Dr. Borlaug was a Nobel Prize winner and associated with Rockefeller University, a most prestigious research institution here in New York City. This plaintiff also furnished Devlin with the telephone numbers of other eminent scientists in the field of pest control who should be contacted for their views on the subject. Devlin offered Dr. White-Stevens the opportunity to publish a story on the Op-Ed page of the Times, or even write an article for the Sunday Magazine section, but this offer was never followed up by Devlin.

Finally, Dr. White-Stevens recapitulated this conversation in a letter to Devlin on August 8 in which he furnished a list of materials for Devlin to read.

Devlin next called Dr. Jukes on August 7. The testimony of Dr. Jukes showed that he is an eminent scientist in the area of biochemistry and regarded as an international authority on poultry nutrition. He

organized the first chapter of the Sierra Club outside the state of California. Devlin told Dr. Jukes that he was working on an article predicated on information given to him by the Society to the effect that Dr. Jukes was a paid liar on behalf of the chemical industry. Dr. Jukes explained to Devlin his method of evaluating bird counts and referred to a letter written by the president of the Hawk Mountain Association. This plaintiff also told Devlin he was not a liar. The telephone conversation was followed up by Dr. Jukes in a letter sent to Devlin the same day.

Devlin also spoke on the telephone to Dr. Spencer who was not a party to this action, nor did he testify as a witness. However, Devlin's notes show that he wrote "WOW" next to the notation that Spencer called the statements in the Foreword libelous. Devlin testified on trial, "These are newsmaking names. The charges are very dramatic and newsy."

We thus have an initial publication which was not actionable in the absence of names. The reporter pushes for disclosure of the names so that he might write a story, in a newspaper with over 900,000 daily circulation, about individuals who have been called liars in one of the Society's publications. He

knows from the inception that one of the scientists being called a liar is a Nobel Prize winner. He finds out as early as ten days before publication that at least two of the plaintiffs are not in the employ of the pesticide industry, nor are they being paid by such manufacturers to lie. He is given extensive background material on the views of these persons. He is furnished with names of other scientists with whom he might check out the story. He never made any effort to consult with counsel for the Times as to possible liability if the story were published. There is no evidence that any of his superiors made such inquiry.

Ten days were devoted to putting this story in shape with three different drafts of summaries sent by Devlin to his superiors for approval. Despite the warnings and the information furnished the reporter, the story appears in the newspaper as though it had been written the day after the Foreword first appeared in print and no investigation had ever been made. Dr. White-Stevens testified that after a week, he stopped reading the Times for any story as to the Foreword. He assumed that Devlin had checked out what he had told Devlin and that Devlin was satisfied that the story was not warranted. Great was this plaintiff's surprise when a student brought the story to his attention. He read

it and found that Devlin had ignored everything he told him in the lengthy telephone conversation and in his letter to Devlin.

It cannot be said that the Times knew that the statements in the story were false. However, the jury was justified in finding clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not. This satisfies the test of malice as defined in the Sullivan case, supra.

This evidence also satisfied the test in St. Amant v. Thompson, 390 U.S. 727, 731 (1968), to the effect that:

"[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

I am aware of the words in the sentence following the above quotation, which states that such a test "permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." I cannot take those words to mean that the reporter's testimony is not subject to

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impeachment by the accepted use of cross-examination and
contradictory direct testimony.

Motion denied.

So ordered.

Dated: New York, N. Y.
December 1, 1976

Charles M. Metzger
U. S. D. J.

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12/9/76 28
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73 CIV. 1727
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Defendants.

The standard of liability set forth in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), permits recovery only if the plaintiff proves "that the

statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." A great deal of the background of this lawsuit has been set forth in the companion motion brought by the New York Times Company and need not be repeated here.

On this motion the court must view the evidence in the light most favorable to the plaintiffs. O'Connor v. Pennsylvania R.R., 308 F.2d 911, 914 (2d Cir. 1962).

Aroib was asked by Devlin for the names of the scientists to whom he was referring as paid liars in the foreword to the April 1972 issue of American Birds. American Birds is a magazine published by the Society. Aroib told Clement about Devlin's request and Clement was the person who furnished the names. Clement is an officer of the Society with the title of Vice President for Biology, "which means that I had overview of the scientific validity of Audubon Society positions."

Clement knew the purpose for which those names would be used in the Times story. He deliberately called those plaintiffs liars. Clement read the story in the Times on the morning of publication and sent a letter over Aroib's name to the New York Times. This letter referred to "Jack Devlin's punchy piece," and went on to say, "[n]or do we like to call people liars, but"

those who have misused the bird count data have had the opportunity to learn of their misinterpretations from the Society's explanations. Clement testified that the import of this letter was to rebut the statement that the five named persons were being called liars. He testified that the language in the letter meant that "we are not calling people liars." Despite Clement's testimony, the jury was entitled to draw the inference from the letter that Clement did intend to call the five liars.

No amount of honest controversy regarding the use of the bird count in the D.D.T. controversy can justify this action. There just was no basis for calling the plaintiffs paid liars.

Finally, the jury observed Clement on the witness stand. His demeanor and attitude added to the background of the facts which the jury was justified in finding from the evidence. For example, he flatly denied that anyone was being called a liar in the Foreword. The evidence amply supports the verdict of the jury of actual malice as defined in the Sullivan case supra.

Motion denied.

So ordered.

Dated: New York, N. Y.
December 8, 1976

CHARLES M. METZNER

U. S. J.

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Metzner, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

-against-

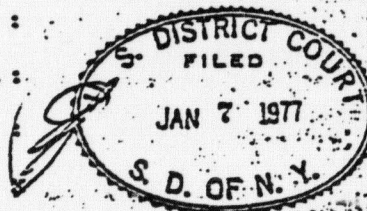
NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIE, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.,

Defendants.

Docket Nos.:
73 Civ. 1727 (CMM)
73 Civ. 3153 (CMM)

JUDGMENT

77,150



This action having been tried before the Court and a jury, the Hon. Charles M. Metzner, United States District Judge, presiding, and the Court having instructed the jury to find a general verdict and also to make answers to certain interrogatories and the jury having duly rendered a verdict and having made answer to said interrogatories; and defendant, The New York Times Company, having moved to set aside the verdict, and for judgment in its favor notwithstanding the verdict, and the Court having filed its opinion on December 2, 1976 denying said motion; and defendant, Roland C. Clement, having moved to set aside the verdict and for judgment in his favor, notwithstanding the verdict, and the Court having filed its opinion on December 8, 1976 denying said motion,

IT IS ORDERED AND ADJUDGED,

1. That plaintiff J. GORDON EDWARDS, Ph.D., recover from defendants THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT the sum of \$21,000.00 and from defendant ROLAND C.

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CLEMENT the additional sum of \$1.00, with interest thereon as provided by law together with his costs.

2. That plaintiff THOMAS H. JUKES, Ph.D., recover from defendants THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT the sum of \$20,000.00 and from defendant ROLAND C. CLEMENT the additional sum of \$1.00, with interest thereon as provided by law together with his costs; and

3. That plaintiff ROBERT H. WHITE-STEVENS, Ph.D., recover from defendants THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT the sum of \$20,000.00 and from defendant ROLAND C. CLEMENT the additional sum of \$1.00, with interest thereon as provided by law together with his costs.

Dated: New York, New York

January 7, 1977

Raymond F. Buzhardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENSON, Ph.D.

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIS J. STAHR, JR.

Defendants

JUDGMENT

CARILL GORDON & REINDEL
Attorneys for The New York
Times Company, Inc.
Office and Post Office Address,
80 Pine Street,
Borough of Manhattan, New York, N.Y. 10005
944-7400

To Esq.
Attorneys for

Due and timely service of a copy of the
within
is hereby admitted.

Dated, N. Y.,, 19

Attorneys for

218a

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At a Sated Term of the United States District Court
for the Southern District of New York, held in the
United States Court House in the Borough of Man-
hattan, City of New York on the THIR
day of JUNE in the year of our Lord, One
Thousand Nine Hundred and Seventy SIX

PRESENT: CHARLES M. METZNER
HONORABLE: United States District Judge.

J. GORDON EDWARDS -
THOMAS H. JUKES
ROBERT H. WHITE-STEVEN'S

NATIONAL AUDUBON Soc. Inc
THE NEW YORK TIMES INC
ROBERT S. ARBIB
ROLAND C. CLEMENT
ELVIS J. STAHN

73 CV 1727
73 CV 3153

Docket No. _____

Now comes the Plaintiff by ROTHWELL-BERNDTSON & LAYFELLO
By THOMAS A. ROTHWELL OF COUNSEL
and moves the trial of this cause. Likewise comes the Defendants AUDUBON - ARBIB - CLEMENT
AND STAHN BY GIFFORD - WOODY - CARTER AND HAYS
By EMMET AGOLIA OF COUNSEL and CHARLES TROWBRIDGE
AND CAHILL - GORDON & REINDEL
BY FLOYD ABRAMI OF COUNSEL

JUN 3 1976

JURY IMPEACHED AND SWORN - TRIAL BEGUN.

JUN 4 1976 Trial continued

JUN 7 1976 Trial continued

Motion to dismiss this action as to Elvis J. Stahn is granted.
All other matters Decision Reserved.

JUN 8 1976 Trial continued

JUN 9 1976 Trial continued and concluded

Verdict attached. Counsel for
(10) days in which to file motion.

(AN EXTRACT OF THE MINUTES)

JUN 10 1976

As to the August 14, 1972 article in The New York

Times:

a. Was White-Stevens libelled?

✓ Yes No

b. If yes, by which defendant(s)?

National Audubon Society Yes ✓ No

Arbib Yes ✓ No

Clement ✓ Yes No

The New York Times ✓ Yes No

c. If yes, what amount do you award as compensatory damages? \$ 20,000.⁰⁰

d. If yes, in (b), what amount, if any, do you award as punitive damages:

National Audubon Society \$

Arbib \$

Clement \$ NONE

The New York Times \$ NONE

*Esmer Haniel
Loulady*

As to the August 14, 1972 article in The New York

Times:

a. Was Jukes libelled?

✓ Yes No

b. If yes, by which defendant(s)?

National Audubon Society Yes ✓ No

Arbib Yes ✓ No

Clement ✓ Yes No

The New York Times ✓ Yes No

c. If yes, what amount do you award as compensatory damages? \$ 20,000.00

d. If yes in (b), what amount, if any, do you award as punitive damages:

National Audubon Society \$

Arbib \$

Clement \$ NONE

The New York Times \$ NONE

Sean Hurd

22a

As to the August 14, 1972 article in The New York Times:

a. Was Edwards libelled?

✓ Yes No

b. If yes, by which defendant(s)?

National Audubon Society Yes ✓ No

Arbib Yes ✓ No

Clement ✓ Yes No

The New York Times ✓ Yes No

c. If yes, what amount do you award as compensatory damages? \$ 21,000.00

d. If yes in (b), what amount, if any, do you award as punitive damages:

National Audubon Society \$

Arbib \$

Clement \$ NONE

The New York Times \$ NONE

Deane H. ...

223a

As to the August 14, 1972 letter to the Editor
of the New York Times:

a. Was Edwards libelled?

☒ Yes ☐ No

b. If yes, by which defendant(s)?

National Audubon Society

☐ Yes ☒ No

Arbib

☐ Yes ☒ No

Clement

☒ Yes ☐ No

c. If yes, what amount do you award as compensatory
damages? \$ 1.00

d. If yes in (b), what amount, if any, do you award
as punitive damages?

National Audubon Society

\$

Arbib

\$

Clement

\$ NONE

Sean Farrell

224a

As to the August 14, 1972 letter to the Editor
of the New York Times:

a. Was Jukes libelled?

✓ Yes - No

b. If yes, by which defendant(s)?

National Audubon Society Yes ✓ No

Arbib Yes ✓ No

Clement ✓ Yes No

c. If yes, what amount do you award as compensatory
damages? \$ 1.00

d. If yes in (b), what amount, if any, do you award
as punitive damages?

National Audubon Society \$

Arbib \$

Clement \$ NONE

Seamus Handell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

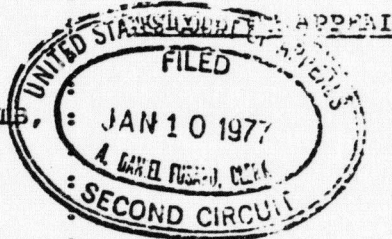
J. GORDON EDWARDS, Ph.D., THOMAS H.
JUKES, Ph.D., ROBERT H. WHITE-STEVENS,
Ph.D.

Plaintiffs,

- against -

NATIONAL AUDUBON SOCIETY, INC., THE NEW
YORK TIMES COMPANY, INC., ROBERT S. ARBIS,
JR., ROLAND C. CLEMENT, ELVIS J. STAHR,
JR.,

Defendants.



NOTICE is hereby given that defendant, ROLAND C. CLEMENT, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment in favor of the plaintiffs against this defendant entered in this action on or about the 9th day of December, 1976; and further appeals from the Orders denying said defendant's motions for summary judgment originally entered January 26, 1976 and upon motion for reargument modified by Order entered April 16, 1976; and also appeals from the motion for judgment notwithstanding the verdict denied by Order dated December 8, 1976.

Dated: January 3, 1977

CROWE, MCCOY, AGOGLIA, FOGARTY & ZWEIBEL, P.C.

BY

[Signature]
A Member of the Firm
Attorneys for Defendant, ROLAND C. CLEMENT
80 East Old Country Road
Mineola, New York 11501

GIFFORD, WOODY, CARTER & HAYS

BY

[Signature]
A Member of the Firm

FILED

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226a

S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENSON, Ph.D.,

Plaintiffs,

-against-

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR.,
ROLAND C. CLEMENT,
ELVIN J. STAHR, JR.,

Defendants.

NOTICE OF APPEAL

73 CIV. 1727 (CMM)

PLEASE TAKE NOTICE that The New York Times Company, a
defendant above named, hereby appeals to the United States Court

of Appeals for the Second Circuit from the judgment in favor of
plaintiffs entered on January 7, 1977 and from the Orders of the
Hon. Charles M. Metzner, entered in this action on (a) the 2nd
day of December, 1976 denying defendant The New York Times Com-
pany's motion for judgment notwithstanding the verdict rendered
by a jury in favor of the plaintiffs in this action; (b) the 7th
day of June, 1976 denying defendant The New York Times Company's
motion for a directed verdict, said motion having been renewed at
the close of the submission of all evidence; and (c) the 23rd
day of January, 1976, denying defendant The New York Times Com-
pany's motion for summary judgment and the opinion entered April
15, 1976 with respect thereto.

Dated: New York, New York
January 11, 1977

CAHILL GORDON & REINDEL

By

A Member of the Firm
Attorneys for Defendant The New
York Times Company, Inc.
80 Pine Street
New York, New York 10005
212-925-0100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

227a

J. GORDON EDWARDS, Ph.D., THOMAS H.
JUKES, Ph.D., ROBERT H. WHITE-STEVENS,
Ph.D.,

Plaintiffs,

- against -

NATIONAL AUDUBON SOCIETY, INC., THE NEW
YORK TIMES COMPANY, INC., ROBERT S.
ARBIB, JR., ROLAND C. CLEMENT, ELVIS J.
STAHR, JR.,

Defendants.

73 CIV. 1727
(CMM)

AMENDED
NOTICE OF APPEAL

NOTICE is hereby given that defendant,
ROLAND C. CLEMENT, hereby appeals to the United States
Court of Appeals for the Second Circuit, from the final
judgment in favor of the plaintiffs against this defendant
entered in this action on or about the 7th day of January,
1977; and further appeals from the Orders denying said
defendant's motions for summary judgment originally entered
January 26, 1976 and upon motion for reargument modified by
Order entered April 16, 1976; and also appeals from the
motion for judgment notwithstanding the verdict denied by
Order dated December 8, 1976.

Dated: January 3, 1977

CROWE, MCCOY, AGOSTA, POGARTY & ZWIBEL, P.C.

BY

[Signature]
A Member of the Firm
Attorneys for Defendant, ROLAND C. CLEMENT
80 East Old Country Road
Mineola, New York 11501

GIFFORD, WOODY, CARTER & HAYS

BY

A Member of the Firm

228a

Attorneys for Defendant, ROLAND C. CLEMENT
14 Wall Street
New York, New York 10005

TO: RANDOLPH J. SPIFERT, ESQ.
Attorney for Plaintiffs
11 East 44th Street
New York, N.Y. 10017

ROTHWELL, CAPELLO & BERNDTSON, ESQS.
Counsel to Attorney for Plaintiffs
1225 - 19th Street, N.W.
Washington, D.C.

CAHILL, GORDON & REINDEL, ESQS.
Attorney for Defendant
THE NEW YORK TIMES COMPANY, Inc.
80 Pine Street
New York, N.Y. 10005

CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

